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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

LORENZO JELKS,,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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January 19, 1999

13 pp

QUESTION PRESENTED

Can a federal administrative agency deny a request for a license or other valuable privilege because of the requesting party's failure to comply with a purported change in agency policy if (1) the agency has not issued any decision or statement announcing the purported change and (2) the requesting party relies on decisions and statements of the agency staff which presume that there has been no change in policy?

LIST OF PARTIES

PETITIONER:

Lorenzo Jelks

RESPONDENT:

Federal Communications Commission

INTERVENORS:

Gonzales Broadcasting, Inc.

Metropolitan Management Corporation

QRW Partners Limited Partnership

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 3

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 6

FCC Proceedings 6

Court of Appeals Decisions 10

THE WRIT SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS HAS ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT 13

CONCLUSION 25

APPENDIX

Jelks v. FCC, 146 F.3d 878 (D.C. Cir. 1998) 1a

Order Withholding Mandate (D.C. Cir. June 16, 1998) 8a

Order (D.C. Cir. Oct. 20, 1998) 9a

Order (D.C. Cir. Oct. 20, 1998) 10a

Page

Order (D.C. Cir. Oct. 20, 1998) 11a

Order (D.C. Cir. Oct. 30, 1998) 12a

Order (D.C. Cir. Dec. 3, 1998) 13a

Mableton Broadcasting Company, Inc.,
FCC 88M-3900 (ALJ Nov. 16, 1998) 14a

Mableton Broadcasting *Company, Inc.*,
5 FCC Rcd 2474 (ALJ 1990) 18a

Mableton Broadcasting Company, Inc.,
8 FCC Rcd 7609 (Rev. Bd. 1993) 32a

Gonzales Broadcasting Company, *Inc.*,
12 FCC Rcd 12253 (1997) 48a

5 U.S.C. § 706 ..... 61a

47 U.S.C. § 308 ..... 62a

47 U.S.C. § 309 ..... 64a

47 U.S.C. § 319 ..... 66a

47 U.S.C. § 402 ..... 67a

47 C.F.R. § 73.3522 ..... 71a

Form 301 Application of
Lorenzo Jelks (excerpts) 75a

Appendix to Lorenzo Jelks' Consolidated
Brief and Exceptions to Initial Decision
of ALJ Walter C. Miller (May 14, 1990)
(excerpts) 78a

Page

Hearing Transcript, MM Docket No. 88-400
(March 7, 1989) (excerpts).....94a

TABLE OF AUTHORITIES

Page

Cases:

Ashbacker Radio Corp. v. FCC,
326 U.S. 327 (1945) 7

Bamford v. FCC, 535 F.2d 78
(D.C. Cir.), *cert. denied*,
429 U.S. 895 (1976) 14

CBS v. FCC, 454 F.2d 1018
(D.C. Cir. 1971) 20

General Electric Company v. EPA,
53 F.3d 1324 (D.C. Cir. 1995) 15

Greater Boston Television Corp. v. FCC,
444 F.2d 841 (D.C. Cir. 1970),
cert. denied, 403 U.S. 923 (1971) 20

Jelks v. FCC, 146 F.3d 878
(D.C. Cir. 1998) 2, 11, 12

Maxcell Telecom Plus, Inc. v. FCC,
815 F.2d 1551 (D.C. Cir. 1987) 14

McElroy Electronics Corporation v. FCC,
990 F.2d 1351 (D.C. Cir. 1993) 20

*New York State Energy Research and
Development Authority v. FERC*,
746 F.2d 64 (D.C. Cir. 1984) 15

Orange Park Florida T.V., Inc. v. FCC,
811 F.2d 664 (D.C. Cir. 1987) 15

Page

Orion Communications Ltd. v. FCC,
131 F.3d 176 (D.C. Cir. 1997),
cert. denied, 119 S. Ct. 62 (1998) 20

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) 13

Radio Athens, Inc. v. FCC,
401 F.2d 398 (D.C. Cir. 1968) 14

Salzer v. FCC, 778 F.2d 869
(D.C. Cir. 1985) 14

Satellite Broadcasting Co. v. FCC,
824 F.2d 1 (D.C. Cir. 1987) 24-25

Texas Municipal Power Agency v. EPA,
89 F.3d 858 (D.C. Cir. 1996) 14

Administrative Orders:

Chudy Broadcasting Corp.,
58 RR2d 133 (1985) ..... *passim*

CityLight Communications, Inc.,
4 FCC Rcd 1676 (MMB 1989) 11, 12, 22

Dutchess Communications Corp.,
101 FCC2d 243 (Rev. Bd. 1985) 18

Family Broadcasting Group,
93 FCC2d 771 (Rev. Bd. 1983) 17

Gonzales Broadcasting, Inc.,
12 FCC Rcd 12253 (1997) 2-3, 9, 10

Page

Implementation of Section 309(j) of Communications Act– Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, FCC 98-194 (Aug. 18, 1998) 24

Mableton Broadcasting Company, Inc., FCC 88M-390 (ALJ Nov. 16, 1988) 8

Mableton Broadcasting Company, Inc., 5 FCC Rcd 2474 (ALJ 1990) 2, 8

Mableton Broadcasting Company, Inc., 8 FCC Rcd 7609 (Rev. Bd. 1993) 2, 9

Neil N. Levitt, 33 FCC 720 (Rev. Bd. 1962) 17

Oara, Inc., 3 FCC Rcd 5659 (MMB 1988) 7

Puget Sound Power & Light Company, 78 FERC ¶ 63,001 (Jan. 10, 1997) 14

REM Malloy Broadcasting, 4 FCC Rcd 8423 (ALJ 1989), *aff'd on other grounds*, 6 FCC Rcd 5843 (Rev. Bd. 1991), *aff'd on reh'g*, 11 FCC Rcd 4064 (Rev. Bd. 1996), *aff'd*, 11 FCC Rcd 10823 (1996) 12-13, 21, 22

Revision of Application for Construction Permit, 50 RR2d 381 (1981) 18

RKO General, Inc., 34 FCC2d 265 (Rev. Bd. 1972) 17

White Eagle, Limited Partnership, 3 FCC Rcd 2887 (1988) 7

Page

Statutes:

5 U.S.C. § 706 3

5 U.S.C. § 706(2) 13, 16

28 U.S.C. § 1254(1) 3

47 U.S.C. § 308 4

47 U.S.C. § 309(a) 4, 7

47 U.S.C. § 309(e) 5, 7

47 U.S.C. § 319(a) 5

47 U.S.C. § 402(b)(1) 2

Regulations:

47 C.F.R. § 73.3522 ..... 7, 10, 16, 18

Supreme Court Rules:

Rule 13 3

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

No. 98-

Lorenzo Jelks,

Petitioner,

v.

Federal Communications Commission,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

Lorenzo Jelks ("Jelks") hereby petitions for a writ of certiorari to review the June 16, 1998 decision of the United States Court of Appeals for the District of Columbia Circuit (the "Court of Appeals") which affirmed a decision of the Federal Communications Commission ("FCC" or "Commission") that denied Jelks' application to obtain a construction permit to build a new FM radio station in Mableton, Georgia. Jelks had appealed the adverse FCC decision to the Court of Appeals pursuant to Section

402(b)(1) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 402(b)(1).

The essential issue decided by the FCC and the Court of Appeals is whether Jelks was on notice that he was required to amend his FCC application to change a negative financial certification to an affirmative one before he could introduce hearing evidence concerning his financial qualifications. The FCC and the Court of Appeals concluded that Jelks did have such prior notice and that, therefore, he could not introduce hearing evidence of his financial qualifications.

OPINIONS BELOW

The per curiam opinion of the Court of Appeals is reported at 146 F.3d 878 (D.C. Cir. 1998) and is reproduced in the Appendix at pages 1a-7a. The Appendix includes other orders of the Court of Appeals which (1) denied Jelks' petition for rehearing and suggestion for rehearing *in banc*, (2) temporarily stayed the issuance of the mandate, and (3) denied a post-decision motion for remand filed by Jelks. The FCC decisions under review are reproduced in the Appendix at pages 18a-60a and are reported at *Mableton Broadcasting Company, Inc.*, 5 FCC Rcd 2474 (ALJ 1990), *Mableton Broadcasting Company, Inc.*, 8 FCC Rcd 7609 (Rev. Bd. 1993), and *Gonzales Broadcasting, Inc.*, 12 FCC Rcd 12253

(1997).

STATEMENT OF JURISDICTION

This Court's jurisdiction to review the June 16, 1998 decision of the Court of Appeals is invoked pursuant to 28 U.S.C. § 1254(1). In accordance with Supreme Court Rule 13, this petition is being filed within 90 days of the Court of Appeals' order of October 20, 1998 denying rehearing.

STATUTORY PROVISIONS INVOLVED

Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, provides, in pertinent part, as follows:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —
>
> * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be --
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

> (B) contrary to constitutional right, power, privilege, or immunity;
>
> * * *

Section 308 of the Act, 47 U.S.C. § 308, provides, in pertinent part, as follows:

> (a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it . . . .
>
> (b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station . . . .

Section 309(a) of the Act, 47 U.S.C. § 309(a), provides as follows:

> Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served

> by the granting thereof, it shall grant such application.

Section 309(e) of the Act, 47 U.S.C. § 309(e), provides, in pertinent part, as follows:

> If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. . . . Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

Section 319(a) of the Act, 47 U.S.C. § 319(a), provides, in pertinent part, as follows:

> No license shall be issued under the authority of this Act for the operation of any station unless a permit for its construction has

> been granted by the Commission. The application for a construction permit shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station . . . .

STATEMENT OF THE CASE

FCC Proceedings

On July 10, 1987, Jelks filed a standard Form 301 application (the "Application") with the FCC to obtain a construction permit to build a new FM radio station in Mableton, Georgia. Section III of the Application required Jelks to check either the "Yes" or "No" box in response to the following statement:

> The applicant certifies that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue.

Jelks checked the "No" box because his counsel advised Jelks that he could not rely on the appraised value of his real estate holdings. Jelks nonetheless believed he would be able to use those real estate assets to secure the needed financing. He therefore added that he would "file an amendment relating to his financial qualifications in the near future." (76a).

Seventeen other parties filed separate applications to obtain the construction permit for the Mableton station. Since the applications of Jelks and the other parties were mutually exclusive, the FCC could not make the public interest determination under Section 309(a) of the Act to grant any one of them. Accordingly, in accordance with Section 309(e) of the Act, the applications were designated for an oral evidentiary hearing to determine which of the applications should be granted. *See generally Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

Jelks did not amend his Application prior to the hearing because (1) it took Jelks longer than anticipated to secure the necessary bank financing commitment and (2) Jelks concluded, on the advice of counsel, that the FCC would not accept any amendment after the time period when amendments can be filed as a matter of right under FCC rules.[1] *See* 47 C.F.R. § 73.3522(a)(2).

In due course, the FCC Administrative Law Judge (the "ALJ") added an issue to be resolved at the hearing "[t]o determine whether Lorenzo Jelks is financially qualified to

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[1] The view of Jelks' counsel was confirmed by numerous FCC decisions which (1) denied a pre-hearing motion to amend an application to change a negative financial certification to an affirmative one and (2) designated a hearing issue to determine whether the applicant was financially qualified. *See, e.g., Oara, Inc.*, 3 FCC Rcd 5659 (MMB 1988); *White Eagle, Limited Partnership*, 3 FCC Rcd 2887 (MMB 1988).

be a Commission licensee." *Mableton Broadcasting Company, Inc.*, FCC 88M-390 (ALJ Nov. 16, 1988) at 3 (16a). The ALJ ruled that no discovery would be permitted on the added issue because it was "forward-looking." *Id.* (17a).

Jelks eventually secured the requisite bank financial commitment and timely exchanged his proposed hearing exhibits with the other parties. However, at the hearing on March 7, 1989, the ALJ refused to accept the exhibit showing Jelks to be financially qualified because it "varied" from the negative certification in Jelks' Application, which had not been amended.

On April 11, 1990, the FCC released the ALJ's Initial Decision, which resolved the financial qualifications issue against Jelks. *Mableton Broadcasting Company, Inc.*, 5 FCC Rcd 2474, 2496 (ALJ 1990) (18a). Although he had earlier stated that the hearing on Jelks' financial qualifications would be "forward looking," the ALJ looked backward to conclude that "Jelks is not *now* and never has been financially qualified" – even though the ALJ had acknowledged at the hearing that Jelks' proffered financial evidence (which the ALJ had refused to accept into evidence) appeared to satisfy FCC requirements. 5 FCC Rcd at 2476 (24a) (emphasis added). *See* Hearing Transcript 4136 (94a).

On October 22, 1993, the FCC's Review Board released a Memorandum Opinion and Order affirming the ALJ's refusal to accept Jelks' evidence of his financial qualifications. *Mableton Broadcasting Company, Inc.*, 8 FCC Rcd 7609 (Rev. Bd. 1993) (32a). The decision was premised on the Review Board's conclusion that Jelks had "made no attempt to either amend his application or show 'good cause' for such an amendment as required under 47 C.F.R. §73.3522." 8 FCC Rcd at 7616 (38a). The Review Board then granted the application of Gonzales Broadcasting, Inc.

On August 12, 1997, the full Commission released a decision which (1) affirmed the Review Board's denial of Jelks' Application and (2) approved a settlement agreement among the other remaining applicants (who had merged their applications into one entity to receive the Mableton construction permit). *Gonzales Broadcasting, Inc.*, 12 FCC Rcd 12253 (1997) (the "*Decision*") (48a). The Commission rejected Jelks' complaint that he had no prior notice that evidence of his financial qualifications could not be presented unless and until Jelks amended his Application (presumably to change the check in the "No" box to a check in the "Yes" box). According to the FCC, "The principal [sic] is long-established that an applicant's evidence at hearing must conform to the proposal contained in the

application." 12 FCC Rcd at 12259 (58a).

The Commission acknowledged that it "has not always been strict in requiring applicants to file amendments to support their showing at hearing." *Decision*, 12 FCC Rcd at 12259 (58a). However, the Commission claimed that it had changed that earlier policy and adopted a new one which required "strict adherence" to Section 73.3522 of the FCC's rules concerning the filing of amendments. *Id.* The *Decision* did not cite any case or other public document which explicitly announced the change in policy. Rather, the Commission cited only dictum in a footnote from a 1985 case which stated as follows:

> "We have recently undertaken to place greater emphasis on providing service to the public in the most efficient, expeditious manner possible. Temporizing with flawed proposals has in the past disserved the public interest by inordinately delaying the initiation of new service."

Id. (quoting *Chudy Broadcasting Corp.*, 58 RR2d 133, 134-35 n.7 (1985) ("*Chudy*")).

Court of Appeals Decisions

On June 16, 1998, the Court of Appeals affirmed the FCC *Decision* in a per curiam opinion. The court acknowledged (1) that "Jelks is correct in noting that the FCC has not always been strict in requiring good cause to

amend, or amendment at all, in order to introduce evidence at variance with an application" and (2) that "the Commission must provide notice of changes in application requirements, particularly where the sanction for failure to meet those requirements is dismissal without reaching the merits." 146 F.3d at 880 (4a) (citations omitted). The court concluded, however, that Jelks was wrong "in contending that the requirements at issue here had not changed by the time of his evidentiary hearing [in March 1989] and that the agency had not provided adequate notice of that change." *Id.* (5a). According to the court, the FCC's "new policy" was reflected in *Chudy*. *Id.* The court did not cite any other case or statement by the FCC announcing the so-called "new policy."

The Court of Appeals rejected Jelks' reliance on *CityLight Communications, Inc.*, 4 FCC Rcd 1676 (MMB 1989) ("*CityLight*"). That latter decision rejected a broadcast applicant's request to dismiss the application of a competitor who had, like Jelks, (1) checked the "No" box on the financial qualifications inquiry and (2) failed to file an amendment to change that negative certification to an affirmative one. The FCC staff explained that "[t]he remedy for failure to certify is not dismissal, but amendment or, failing that, specification of a financial qualifications issue against the relevant applicant." 4 FCC Rcd at 1677. The

Court of Appeals concluded that *CityLight* was irrelevant to Jelks' situation because (1) the FCC staff "simply did not address the question of how an applicant who failed to amend could introduce evidence at a hearing to meet a financial issue designated against it" and (2) in any event, the decision of a subordinate body "cannot alter a policy set by the Commission itself." 146 F.3d at 881 (7a) (citation omitted).

On July 31, 1998, Jelks filed a petition for rehearing and suggestion for rehearing *in banc*. In that petition, Jelks pointed out, *inter alia*, that *Chudy* had not been regarded by the FCC staff as the promulgation of a new policy concerning financial qualifications amendments (or any other matter) and that the FCC staff had continued to issue decisions on the assumption that there had been no change in policy. In support, Jelks pointed to the January 1989 decision of another FCC administrative law judge which overruled a competitor's objection to the introduction of financial qualifications evidence by an applicant with a negative financial certification. That other judge rejected the argument that an amendment was required because "[n]obody has ever contended that there was a need for an amendment." *REM Malloy Broadcasting*, Hearing Transcript 598 (90a), 4 FCC Rcd 8423 (ALJ 1989), *aff'd on other grounds*, 6 FCC Rcd 5843 (Rev. Bd. 1991), *aff'd on*

reh'g, 11 FCC Rcd 4064 (Rev. Bd. 1996), *aff'd*, 11 FCC Rcd 10823 (1996) ("*REM Malloy*"). The Court of Appeals nonetheless denied Jelks' rehearing petition in an order released on October 20, 1998. (10a, 11a).

THE WRIT SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS HAS ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

By authorizing reviewing courts to set aside federal agency action which is "arbitrary, capricious," or "an abuse of discretion," Section 706(2) of the Administrative Procedure Act, 5 U.S.C. § 706(2), remains a cornerstone of federal administrative law. Each year thousands, if not millions, of parties – from single individuals to start-up ventures to major corporations – file requests with federal administrative agencies to obtain a license, a franchise, or some other valuable privilege to engage in a particular activity. Central to the disposition of those requests is the fundamental principle – mandated by due process – that the requesting party have prior notice of the agency's requirements, particularly when failure to comply with those requirements will result in the denial of the request. *See generally Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992) (this Court has "often identified 'notice' or 'fair

warning' as the analytic touchstone of due process nexus analysis").

As the Court of Appeals acknowledged, the foregoing principle is reflected in numerous lower court decisions concerning the issuance of licenses for broadcast stations and other communications facilities. *Radio Athens, Inc. v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968) ("elementary fairness compels clarity" in the requirements to be followed by a broadcast applicant before its application is dismissed); *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1560 (D.C. Cir. 1987) (same); *Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985) (same); *Bamford v. FCC*, 535 F.2d 78, 82 (D.C. Cir.), *cert. denied*, 429 U.S. 895 (1976) (same). However, the importance of that principle is not confined to FCC matters. Courts and administrative agencies alike have acknowledged the importance of prior notice to parties making requests of other agencies which involve a myriad of matters – from a utility's request to recover stranded costs, *Puget Sound Power & Light Company*, 78 FERC ¶ 63,001 (Jan. 10, 1997), to compliance with hazardous waste regulations. *Texas Municipal Power Agency v. EPA*, 89 F.3d 858, 872 (D.C. Cir. 1996) ("petitioner's reasonable interpretation of the agency's policy" entitled to deference "unless the petitioner, through a good-faith review of the statements issued by the agency, should have been able to

determine, 'with ascertainable certainty,' the criteria that the agency expected the petitioner to satisfy"); *General Electric Company v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) ("agency must always provide 'fair notice' of its regulatory interpretations to the regulated public").

A requesting party's right to prior notice of agency standards is compromised when the agency staff itself is unable to provide the clarity required for the public to understand and abide by the agency's requirements. For that reason, a party's compliance with the agency's requirements can and should be excused if confusion or mistake has been fostered by the agency's own staff. *E.g.*, *Orange Park Florida T.V., Inc. v. FCC*, 811 F.2d 664, 668 (D.C. Cir. 1987) (FCC could properly decide not to apply literal language of rule because "of the confusion sown by the staff's interpretive practices"); *New York State Energy Research and Development Authority v. FERC*, 746 F.2d 64, 68 (D.C. Cir. 1984) (agency erred in refusing to accept application despite non-compliance with agency's new rule because, *inter alia*, "senior FERC employees, who were questioned by the applicant, were themselves unaware of the new rules," and "FERC's official guide to its own filing requirements failed to mention the new rules").

The Court of Appeals' decision in the instant case would undermine those basic principles and impose an

unrealistic burden on members of the public to determine whether vague language in an isolated agency decision – later disregarded by the agency's own staff – was intended to signal a new and more stringent policy. Such a result would not only be unfair to the thousands of parties who make requests of federal agencies every day; that result would also conflict with the command of Section 706(2) that agency action be set aside if it is "arbitrary, capricious," or "an abuse of discretion." 5 U.S.C. § 706(2).

Jelks' plight epitomizes the inequity that could be inflicted by the Court of Appeals' decision. Jelks is a local African American businessman who was prepared to spend twelve years of his life and hundreds of thousands of dollars of his money to pursue the dream of owning a local radio station. When he filed his application in July 1987, Jelks had no reason to know that a negative financial certification would preclude the introduction of evidence of his financial qualifications at any hearing. To be sure, Section 73.3522(b) of the FCC's rules did state that a party could not amend a broadcast application after the designation of hearing in the absence of a "good cause" showing. 47 C.F.R. § 73.3522(b). However, as both the FCC and the Court of Appeals acknowledged, that requirement was often disregarded to allow parties to proffer evidence of their financial qualifications without any amendment to change a negative

financial showing. *E.g.*, *Family Broadcasting Group*, 93 FCC2d 771, 773-74 (Rev. Bd. 1983) (financial amendment filed after conclusion of hearing would be accepted to permit applicant to conform its application to the evidence submitted at hearing); *RKO General, Inc.*, 34 FCC2d 265, 267-68 (Rev. Bd. 1972) (applicant which did not include financial information in its application was not required to amend its application before tendering evidence of financial qualifications at the hearing); *Neil N. Levitt*, 33 FCC 720, 722 (Rev. Bd. 1962) ("[t]he mere fact . . . that the applicant erroneously concluded that an amendment was unnecessary cannot fairly be permitted to be fatal to its application" because opponent "was not in a position to claim surprise, or that it was not afforded adequate opportunity to prepare for the hearing").

Neither the FCC nor the Court of Appeals cited any decision in which the FCC disavowed those precedents and explicitly stated that a broadcast applicant with a negative financial certification could not introduce hearing evidence of its financial qualifications unless and until its application contained an affirmative financial certification. It is true, as the Court of Appeals observed, that the FCC had changed the application form after some of those cases were decided. The FCC initially required broadcast applicants to supply detailed information concerning their financing in the

standard Form 301 application. In 1981, the FCC revised the application form to substitute a certification procedure which required applicants only to answer "Yes" or "No" to whether they were financially qualified. *Revision of Application for Construction Permit*, 50 RR2d 381, 382 (1981) ("*Revision*"). According to the Court of Appeals, adoption of that certification procedure signaled a change in FCC policy that was less forgiving and required applicants to adhere to the strict letter of the rules, particularly Section 73.3522, with respect to financial amendments.

No case cited by the FCC or the Court of Appeals supports the notion that there was any such a change in policy. Certainly the FCC never said anything about a stricter policy when it adopted the certification procedure in 1981. Quite the contrary. The FCC explicitly stated that it was "changing neither substantive law or policy nor any underlying Commission requirement." *Revision*, 50 RR2d at 381. And the FCC's Review Board – charged with implementing the FCC's policy in broadcast hearing cases – saw no retreat from the prior liberal policy of allowing parties to introduce evidence of their financial qualifications. *See Dutchess Communications Corp.*, 101 FCC2d 243, 255 (Rev. Bd. 1985) ("[i]n the case of changes in application proposal[s] which go to basic qualifying matters, the Commission has recently relaxed its 'good cause' standards").

The FCC's vague footnote in *Chudy* is not inconsistent with the foregoing analysis. *Chudy* did not involve an applicant like Jelks who had a negative financial certification and wanted to introduce evidence at the later hearing concerning his financial qualifications. Rather, *Chudy* involved an applicant who voluntarily abandoned the hearing process because of the withdrawal of three of its stockholders and then, after securing new stockholders, asked the FCC judge to reopen the hearing proceedings and accept an amendment to its application with the new stockholders.

The full Commission sustained the judge's rejection of that latter proposal because the applicant had not shown "good cause" for its amendment – a conclusion which the applicant did not dispute. In a footnote, the Commission observed that it would not review the applicant's proposal on its own motion because (1) the Commission had "recently undertaken to place greater emphasis on providing service to the public in the most efficient, expeditious manner" and (2) for that reason, the Commission did not want to temporize with "flawed proposals" that disserve "the public interest by inordinately delaying the initiation of new service." 58 RR2d at 134-35 n.7.

The dictum in the *Chudy* footnote cannot satisfy the FCC's bedrock obligation to explain major changes in policy.

See McElroy Electronics Corporation v. FCC, 990 F.2d 1351, 1361-62 (D.C. Cir. 1993) (an ambiguous footnote cannot serve "as the beacon the Commission would have us think, illuminating the petitioners' treacherous path through the text and guiding them safely to the conclusion that the Commission now urges"). *See generally Orion Communications Ltd. v. FCC*, 131 F.3d 176, 181 (D.C. Cir. 1997), *cert. denied*, 119 S. Ct. 62 (1998) ("the Commission is bound to provide an explanation when it departs from a clear precedent"); *CBS v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971) (FCC "must provide an opinion or analysis indicating that [a] standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law"); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (the FCC, like any other federal agency, is obligated to confront major changes in policy and to provide a "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored"). To the extent that there was any doubt as to the limited scope of the *Chudy* footnote, it was erased by the subsequent statements and actions of the FCC staff charged with implementing any change in broadcast policy.

There is no better illustration of the FCC staff's perception than the decision of the FCC judge (Judge

Chachkin) in the hearing in *REM Malloy*, which transpired in January 1989 – only weeks before Jelks proffered the hearing evidence on his Application. Like Jelks, an applicant in *REM Malloy* (Bernard Dawson) had made a negative financial certification and proposed to introduce hearing evidence of his financial qualifications. When Dawson's counsel (the same counsel representing Jelks at the time) proposed to introduce evidence of Dawson's financial qualifications, another applicant's counsel objected because the exhibit was "a variance from the application." *REM Malloy*, Tr. 586 (80a). In response to Judge Chachkin's question, the counsel conceded that he could not cite any "case authority" to support his objection and that the issue "may be a matter of first impression." Tr. 587, 590 (80a, 83a). *See* Tr. 591 (84a). After listening to extensive argument from other counsel, Judge Chachkin concluded that no amendment was required:

> Here since no financial [information] is called for in the application, then there is no need to change anything . . . . I don't know the basis of his filing an amendment. I have never required it and I have never been reversed on that point. *Nobody has ever contended that there was a need for an amendment* . . . .

Tr. 597, 598 (89a, 90a) (emphasis added). Judge Chachkin thereupon accepted Dawson's evidentiary proffer and

ultimately concluded that Dawson was financially qualified, a conclusion which, as Judge Chachkin anticipated, was not reversed on appeal. *REM Malloy*, 4 FCC Rcd at 8429.

Judge Chachkin and participating counsel in *REM Malloy* were not the only ones unaware of the FCC's alleged new policy in *Chudy*. On February 10, 1989 – one week after Jelks had timely exchanged his hearing exhibits on the financial issue with the other parties – the FCC staff issued its decision in *CityLight*. In retrospect, there may be, as the Court of Appeals' decision indicates, ways to dissect the FCC staff's language, but no amount of linguistic dissection can camouflage the obvious fact that the staff made no mention of *Chudy* or any new policy, a telling omission because, if the Commission had promulgated a new policy, the FCC staff certainly would have wanted to explain the procedures to be followed by parties who filed negative financial certifications.

Equally telling are other pre-1989 cases in which the FCC staff rejected an applicant's effort to change a negative financial certification to a positive one and then designated a financial qualifications issue which would require the applicant to present evidence at the forthcoming hearing. *See supra* note 1 and sources cited therein. The designation of a financial qualifications hearing issue would make no sense if the FCC's and Court of Appeals' characterization of

FCC policy were correct. It would obviously be pointless to designate a hearing issue on the applicant's finances if the applicant was going to be precluded from proffering any evidence.[2]

If further proof is needed concerning the reasonableness of Jelks' understanding of FCC policy, it is supplied by the ALJ in Jelks' own case. That judge, although experienced in presiding over comparative broadcast cases, never once cited *Chudy* or any new FCC policy in concluding that Jelks' evidentiary proffer should be rejected (perhaps because none of the counsel representing Jelks' competitors or the FCC's Mass Media Bureau mentioned *Chudy* or any new FCC policy).

The instant case, then, presents far more than the narrow question of whether Lorenzo Jelks should have been allowed to present evidence of his financial qualifications to

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[2] If given a choice, applicants always would have preferred to have an amendment accepted rather than confront an issue at hearing. If an amendment were accepted (changing a negative certification to an affirmative one), the applicant could avoid the time, expense, and uncertainty of a hearing issue where opponents would have the right to discovery and the opportunity to cross-examine witnesses. In short, an applicant's right to present evidence of its financial qualifications did not mean that the FCC judge or the reviewing FCC bodies would find the applicant financially qualified.

the FCC.[3] The instant case raises the more fundamental question whether members of the public should face the risk that a federal administrative agency will deny their request because they have failed to follow a purported policy change which (1) was never announced and (2) is inconsistent with subsequent agency staff decisions and statements. Stated another way, this Court should not allow a federal administrative agency to "punish a member of the regulated class for reasonably interpreting Commission rules" and thereby turn the administrative process into a game of "'Russian Roulette.'" *Satellite Broadcasting Co. v. FCC*, 824

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[3] Ironically, shortly after the Court of Appeals rendered its decision, the FCC adopted rules to auction construction permits like the one Jelks and his competitors had been pursuing for more than ten years. *Implementation of Section 309(j) of Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, FCC 98-194 (Aug. 18, 1998). In that order, the FCC stated (1) that it would no longer review an applicant's financial qualifications because an applicant would be unlikely to pay a winning bid unless the applicant had the financial qualifications to construct the station and (2) that eligible bidders would include applicants whose applications had previously been denied or dismissed if such denial or dismissal had not become "final (*e.g.* when an applicant failed to seek further administrative or judicial review of that ruling . . . .)." *Id.* ¶¶ 89, 99, 176. Since the denial of his Application had not yet become final, Jelks filed a motion for remand with the Court of Appeals so that Jelks could participate in an auction for the Mableton construction permit. That motion was denied. In any event, if the Court of Appeals' decision is reversed and the matter is remanded to the FCC, Jelks would then be eligible to participate in the auction.

F.2d 1, 3-4 (D.C. Cir. 1987).

CONCLUSION

If allowed to stand, the Court of Appeals' decision will subject the public to the risk that a federal administrative agency could deny a request for a valuable privilege because of a purported change in policy which (1) was not made known before the denial and (2) is inconsistent with agency practice. Accordingly, the instant petition for a writ of certiorari should be granted.

January 19, 1999

Respectfully submitted,

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Lorenzo Jelks

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 18, 1998 Decided June 16, 1998

No. 97-1544

LORENZO JELKS,

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee

GONZALES BROADCASTING, INC., et al.,

Intervenors

Appeal of an Order of the
Federal Communications Commission

Lewis J. Paper argued the cause and filed the briefs for appellant.

Roberta L. Cook, Counsel, Federal Communications Commission, argued the cause for appellee, with whom *Christopher J. Wright,* General Counsel, and *Daniel M. Armstrong,* Associate General Counsel, were on the brief.

James J. Freeman, Dennis F. Begley, Margaret L. Tobey and *Curtis T. White* were on the brief for intervenors Gon-

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Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

zales Broadcasting, Inc., et al. *Matthew H. McCormick* entered an appearance.

Before: SENTELLE, RANDOLPH and GARLAND, *Circuit Judges.*

Opinion for the court filed PER CURIAM.

PER CURIAM: Lorenzo Jelks appeals from a decision by the Federal Communications Commission (FCC) denying his application for a construction permit to build a new FM radio station in Mableton, Georgia. Because Jelks never amended his application to indicate that he had the necessary financial qualifications, and because such an amendment was necessary before Jelks could submit evidence of his qualifications at a hearing, we affirm the decision of the Commission.

Jelks filed his application for a construction permit on July 10, 1987. At the time, the application form required each applicant to check either a "yes" or "no" box in response to the following:

> The applicant certifies that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue.

Jelks checked the "no" box, but added: "Applicant will file an amendment relating to his financial qualifications in the near future." Jelks never filed the promised amendment.

The FCC issued a hearing designation order [1] to consider the applications of Jelks and numerous competitors, and

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[1] The hearing designation order was issued pursuant to 47 U.S.C. § 309(e), which provides that the Commission "shall formally designate [an] application for hearing" if "a substantial and material question of fact is presented" or if the Commission is unable to make a finding under § 309(a) "that public interest, convenience and necessity would be served by the granting" of the application.

subsequently added a financial qualifications issue against Jelks. Jelks made no effort to amend his application or to show good cause for the late filing of an amendment. Instead, at the March 7, 1989 evidentiary hearing, Jelks proffered an exhibit to show that he was financially qualified. The administrative law judge (ALJ) rejected the exhibit because it varied from the "no" certification in Jelks' application and because Jelks had failed to amend the application. Thirteen months later, noting that Jelks still hadnot filed an amendment, the ALJ ruled against Jelks on the financial qualifications issue and denied his application. *See Mableton Broad. Co.*, 5 F.C.C. Rcd 2474, 2496 (1990).

Jelks filed exceptions with the FCC's Review Board, which affirmed the denial of Jelks' application on the ground that he had neither amended his application nor shown good cause for filing an amendment late. *See Mableton Broad. Co.*, 8 F.C.C. Rcd 7609, 7616 (1993). Jelks then appealed to the FCC. The Commission denied the petition for review, holding it was FCC policy at the time of Jelks' application that, in order to make a showing at a hearing contradicting a representation in an application, an amendment supported by good cause was required. *See Gonzales Broad., Inc.*, 12 F.C.C. Rcd 12,253, 12,259 (1997). At the same time, the Commission approved a settlement among the remaining applicants and, pursuant thereto, granted the application of intervenor Gonzales Broadcasting, Inc. *See id.* at 12,260.

FCC rules provide that an application may be amended as of right before the application is designated for hearing, *see* 47 C.F.R. § 73.3522(a), and, in comparative broadcasting cases, within thirty days after the application has been designated for hearing if the amendment relates to issues first raised in the designation order, *see* 47 C.F.R. § 73.3522(b)(2). Thereafter, the agency will consider amendments "only upon a showing of good cause for late

filing." 47 C.F.R. § 73.3522(b)(1).[2] In an apparent effort to avoid the consequences of the "good cause" requirement, Jelks contends that his financial qualifications exhibit should have been allowed into evidence without amendment of his application. Citing cases from 1981 and before, he asserts that Commission policy permitted applicants to tender financial qualifications evidence at variance with their applications without submitting an amendment supported by good cause. Moreover, he contends, even if there were a change in that policy prior to his hearing, the FCC provided insufficient notice of that change.

Jelks is correct in noting that the FCC has not always been strict in requiring good cause to amend, or amendment at all, in order to introduce evidence at variance with an application. *See Aspen FM, Inc.*, 6 F.C.C. Rcd 1602, 1603 (1991) (discussing pre-1981 policy); *Neil N. Levitt*, 33 F.C.C. 720, 722 (Rev. Bd. 1962). The FCC has conceded as much. *See Gonzales Broad.*, 12 F.C.C. Rcd at 12,259. Jelks is also correct that the Commission must provide notice of changes in application requirements, particularly where the sanction for failure to meet those requirements is dismissal without reaching the merits. *See Salzer v. FCC*, 778

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[2] In *Erwin O'Conner*, the FCC Review Board identified the following factors as relevant to the good cause determination:

> that [the party seeking to amend] acted with due diligence; that the proposed amendment was not required by the voluntary act of the applicant; that no modification or addition of issues or parties would be necessitated; that the proposed amendment would not disrupt the orderly conduct of the hearing or necessitate additional hearing; that the other parties will not be unfairly prejudiced; and that the applicant will not gain a competitive advantage.

22 F.C.C.2d 140, 143 (1970); *see also Royce Int'l Broad. Co. v. FCC*, 820 F.2d 1332, 1335 (D.C. Cir. 1987) (citing *Erwin O'Conner* and discussing same factors in television licensing context).

F.2d 869, 875 (D.C. Cir. 1985); *see also CHM Broad. Ltd. Partnership v. FCC*, 24 F.3d 1453, 1457–58 (D.C. Cir. 1994). Jelks is wrong, however, in contending that the requirements at issue here had not changed by the time of his evidentiary hearing and that the agency had not provided adequate notice of that change.

Prior to 1981, the FCC required broadcast applicants to submit detailed documentation demonstrating their financial qualifications. In 1981, the Commission substituted a revised application form that, among other things, required only a simple "yes" or "no" certification to the financial qualifications statement set out above. *See Mission Broad. Corp. v. FCC*, 113 F.3d 254, 258 (D.C. Cir. 1997); *Revision of Application for Construciton Permit for Commercial Broadcast Station*, 50 Rad. Reg. 2d (P & F) 381, 382, 397 (1981). Once it adopted this certification policy, the FCC also "generally required that an applicant 'demonstrate that it had a reasonable assurance of financing at the time that it made its initial certification' before it [would] be permitted to amend its application." *Mission Broad.*, 113 F.3d at 261 (quoting *Pontchartrain Broad. Co. v. FCC*, 15 F.3d 183, 184 (D.C. Cir. 1994)). As we explained in *Mission Broadcasting*, the Commisison "modified its liberal amendment policy . . . when it eliminated the requirement that each applicant submit detailed financial documents; the agency was concerned that an applicant would certify to its financial qualifications first and secure its financing only later." *Id.* (citing *Pontchartrain Broad.*, 15 F.3d at 185); *see also Aspen FM*, 6 F.C.C. Rcd at 1603.

The Commission's new policy was reflected in its 1985 decision in *Chudy Broadcasting Corp.*, 58 Rad. Reg. 2d (P & F) 133 (1985). There, the ALJ refused to permit a post-designation amendment, unsupported by good cause, of a broadcast application. On review, the Commission rejected the applicant's contention that it should have been permitted

to continue to prosecute its application without an amendment. And since without the amendment the applicant was left with a proposal that was not financially viable, the FCC upheld the dismissal of the application. *See id.* at 135. The Commission explained:

> We have recently undertaken to place greater emphasis on providing service to the public in the most efficient, expeditious manner possible. Temporizing with flawed proposals has in the past disserved the public interest by inordinately delaying the initiation of new service.

Id. at 134–35 n.7. *Cf. Hillebrand Broad., Inc.*, 1 F.C.C. Rcd 419, 419 (1986) (recognizing that procedural deficiencies in applications did not always result in dismissal in the past, and that "applicants' temporizing activities have been indulged on occasion," but emphasizing that "times have changed and so has Commission policy"). *See also Edwin A. Bernstein*, 4 F.C.C. Rcd 8420 (Rev. Bd. 1989), *rev. denied*, 5 F.C.C. Rcd 2843 (1990), *aff'd sub nom. Lefebvre v. FCC*, 926 F.2d 1215 (D.C. Cir. 1991) (table).

As against these developments, Jelks principally cites two opinions which, he claims, justified his purported ignorance of the need to amend his application—a claim belied by his representation on that application that he would "file an amendment relating to his financial qualifications in the near future." The first is the FCC's 1983 decision in *South Florida Broadcasting Co.*, which held that a pre-1981 applicant that had failed to demonstrate its financial qualifications on the old form could not avoid a hearing simply by amending its application to add the post-1981 "yes" certification. *See* 94 F.C.C.2d 452, 455 (1983); *see also Q Prime Inc.*, FCC 91M-629 (ALJ Feb. 15, 1991). But the FCC's decision that an amendment is not *sufficient* to resolve a financial qualifications issue hardly establishes that it is not a *necessary* precondition to so doing.

Jelks also cites a 1989 decision by the FCC's Video Services Division, holding that an application was not necessarily "unacceptable for filing" simply because the applicant had marked the "no" box regarding financial certification. *See Citylight Communications, Inc.*, 4 F.C.C. Rcd 1676, 1676–77 (1989). Although the Division did state in dictum that "[t]he remedy for failure to certify is not dismissal, but amendment or, failing that, specification of a financial qualifications issue against the relevant applicant," *id.* at 1677, the only question at issue was whether the application could be filed. Hence, *Citylight* simply did not address the question of how an applicant who failed to amend could introduce evidence at a hearing to meet a financial issue designated against it. Of course, even if *Citylight* were inconsistent with the policy the FCC set for post-designation amendments in *Chudy*, Jelks could hardly take any comfort from it. As counsel for Jelks conceded at oral argument, a subordinate body like the Division cannot alter a policy set by the Commission itself. *See Amor Family Broad. Group v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1990).

We conclude that the FCC provided Jelks with adequate notice that if he wanted to submit an exhibit at variance with his application, he would have to amend that application and show good cause for late filing. Because he did not do so, the ALJ did not err in rejecting the exhibit, and neither the ALJ nor the Commission erred in consequently denying Jelks' application. We have considered Jelks' other arguments and find that none warrants reversal of the Commission's decision or further discussion here.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1998

No. 97-1544

Lorenzo Jelks,

Appellant

v.

Federal Communications Commission,

Appellee

Gonzales Broadcasting, Inc., et al.,

Intervenors

[stamp—UNITED STATES COURT OF APPEALS; FOR THE DISTRICT OF COLUMBIA CIRCUIT; FILED JUN 16 1998; CLERK]

ORDER

It is ORDERED, on the court's own motion, that the Clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41(a). This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Eva Brown
Eva Brown
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1998

No. 97-1544

Lorenzo Jelks,

Appellant

v.

Federal Communications Commission,

Appellee

Gonzales Broadcasting, Inc., et al.,

Intervenors

[stamp—UNITED STATES COURT OF APPEALS; FOR THE DISTRICT OF COLUMBIA CIRCUIT; FILED OCT 20 98; CLERK]

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellant's motion for leave to supplement the petition for rehearing and suggestion for rehearing *in banc,* it is

ORDERED that the motion is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Chief Judge Edwards and Circuit Judge Wald did not participate in this matter.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1998

No. 97-1544

Lorenzo Jelks,

Appellant

v.

Federal Communications Commission,

Appellee

Gonzales Broadcasting, Inc., et al.,

Intervenors

[stamp—UNITED STATES COURT OF APPEALS; FOR THE DISTRICT OF COLUMBIA CIRCUIT; FILED OCT 20 98; CLERK]

BEFORE: Sentelle, Randolph and Garland, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed July 31, 1998, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1998

No. 97-1544

Lorenzo Jelks,

Appellant

v.

Federal Communications Commission,

Appellee

Gonzales Broadcasting, Inc., et al.,

Intervenors

[stamp—UNITED STATES COURT OF APPEALS; FOR THE DISTRICT OF COLUMBIA CIRCUIT; FILED OCT 20 98; CLERK]

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellant's Suggestion for Rehearing *In Banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Chief Judge Edwards and Circuit Judge Wald did not participate in this matter.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1998

No. 97-1544

Lorenzo Jelks,

Appellant

v.

Federal Communications Commission,

Appellee

Gonzales Broadcasting, Inc., et al.,

Intervenors

[stamp—UNITED STATES COURT OF APPEALS; FOR THE DISTRICT OF COLUMBIA CIRCUIT; FILED OCT 30 1998; CLERK]

ORDER

Upon consideration of appellant's unopposed motion for stay of mandate, it is

ORDERED that the motion is granted. The Clerk is directed to withhold issuance of the court's mandate for a period of seven days following disposition of the pending motion for remand, should that motion be denied.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1998

No. 97-1544

Lorenzo Jelks,

Appellant

v.

Federal Communications Commission,

Appellee

Gonzales Broadcasting, Inc., et al.,

Intervenors

[stamp—UNITED STATES COURT OF APPEALS; FOR THE DISTRICT OF COLUMBIA CIRCUIT; FILED DEC 3 1998; CLERK]

BEFORE: Sentelle, Randolph and Garland, Circuit Judges

ORDER

Upon consideration of appellant's motion for remand, the response thereto and of the reply, it is

ORDERED that appellant's motion is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 88M-3900
7023

MM Docket No. 88-400

In re Applications of

File No. BPH-870706ML
MABLETON BROADCASTING COMPANY, INC.

File No. BPH-870707MJ
GONZALES BROADCASTING, INC.

File No. BPH-870710MD
BOLTON BROADCASTING, LIMITED

File No. BPH-870710MF
VOTH BROADCASTING COMPANY

File No. BPH-870710MK
Stephen H. Thomas d/b/a REPUBLIC BROADCASTING

File No. BPH-870710MT
RADIO MABLETON LIMITED

File No. BPH-870710MY
METROPOLITAN MANAGEMENT CORPORATION

File No. BPH-870710MZ
LORENZO JELKS

File No. BPH-870710NF
QRW PARTNERS LIMITED PARTNERSHIP

File No. BPH-870710NF
GOLDEN EAGLE BROADCASTING, INC.

File No. BPH-870710NI
RAINBOW BROADCASTING, INC.

File No. BPH-870710NO
HAIRSTON BROADCASTING LIMITED PARTNERSHIP

File No. BPH-870710NP
MABLETON BROADCAST LIMITED PARTNERSHIP

File No. BPH-870710NQ
MABLETON COMMUNICATIONS, LIMITED

For a Construction Permit for a New
FM Station on Channel 273A
Mableton, Georgia

MEMORANDUM OPINION AND ORDER

Issued: November 14, 1988 Released: November 16, 1988

1. Gonzales Broadcasting, Inc. (Gonzales) seeks a ruling on a Petition to Englarge Issues. They filed their petition on October 19, 1988,[1] direct it at Lorenzo Jelks (Jelks), and ask for a financial issue against Jelks. Their petition stands unopposed.[2]

Background Facts

2. At Section III of FCC Form 301 (the application), each applicant is ask to answer the question whether they either have sufficient net liquid assets on hand or available from committed sources to construct and operate the requested facility for three months without revenue.

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[1] Gonzales admits that their petition has been filed one day late. But, they say, it raises a matter of decisional significance, and should be considered under 47 CFR 1.229(c). Gonzales' allegations will be considered on their merits.

[2] Any comments on or oppositions to Gonzales' petition were due on or before November 2, 1988.

3. When Jelks filed his Form 301 on July 10, 1987, he answered that question "no." But he added this statement: "Applicant will file an amendment relating to his financial qualifications in the near future." That's what he said he was going to do. But he never did.

4. Over a year later (on September 8, 1988), the Chief, Audio Services Division designated this case for hearing. See 53 F.R. 35903 published September 15, 1988. Jelks still hadn't filed his financial certification amendment. However, the Chief never mentioned it in his HDO.[3] This caused Gonzales to file the instant pleading.

Ruling

5. Gonzales petition will be granted. They have pleaded with the requisite sufficiency and specificity to warrant adding the financial issue they seek. Jelks had over a year to firm up his application. He must not only prove he is financially qualified, he must also explain why, from July 10, 1987 to October 19, 1988, he never firmed up his application for hearing.

SO the Petition to Enlarge Issues that Gonzales Broadcasting, Inc., filed on October 19, 1988, and directs at Lorenzo Jelks, IS GRANTED; and the issues in this proceeding ARE ENLARGED as follows:

> "Jelks-1: To determine whether Lorenzo Jelks is financially qualified to be a Commission licensee; and
>
> Jelks-2: To determine whether Lorenzo Jelks misrepresented the facts to the Commission on July 10, 1987, when he represented that he would ". . . file an

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[3] Why the Chief never discussed Jelks' deficiency is a mystery. But the Mass Media Bureau hasn't commented on Gonzales' enlargement request.

amendment relating to his financial qualifications in the near future,'' and, if so, what effect that has on Jelks' qualifications to be a Commission licensee.''

Both the burden of proceeding and the burden of proof on Jelks-1 and Jelks-2 is on Lorenzo Jelks. There will be no discovery on Jelks-1, since it is forward-looking. Any discovery on Jelks-2 must be initiated on or before November 21, 1988, and completed by January 23, 1989. Such discovery will conform with the guidelines set out at FCC 88M-3042, released September 16, 1988, at paras. 12-16.

Added issues Jelks-1 and Jelks-2 will be tried in Phase II. The Phase II exhibit exchange, the witness notification, and the hearing date will be set by subsequent order.[4]

FEDERAL COMMUNICATIONS COMMISSION

/s/ Walter C. Miller
Walter C. Miller
Administrative Law Judge

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[4] There are 12 more Petitions to Enlarge outstanding. The Phase II hearing dates will be set when the scope of that Phase becomes clearer.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MM Docket No. 88-400

In re Applications of

File No. BPH-870706ML
MABLETON BROADCASTING COMPANY, INC.

File No. BPH-870707MJ
GONZALES BROADCASTING, INC.

File No. BPH-870710MD
BOLTON BROADCASTING, LIMITED

File No. BPH-870710MF
VOTH BROADCASTING COMPANY

File No. BPH-870710MT
RADIO MABLETON LIMITED

File No. BPH-870710MY
METROPOLITAN MANAGEMENT CORPORATION

File No. BPH-870710MZ
LORENZO JELKS

File No. BPH-870710NF
QRW PARTNERS LIMITED PARTNERSHIP

File No. BPH-870710NO
HAIRSTON BROADCASTING LIMITED PARTNERSHIP

File No. BPH-870710NQ
MABLETON COMMUNICATIONS, LIMITED

For a Construction Permit for a New FM Station
on Channel 273A (102.5 MHZ),
Mableton, Georgia

Appearances

Joseph A. Belisle on behalf of Mableton Broadcasting Company, Inc.; *Dennis F. Begley, Matthew H. McCormick* and *Troy F. Tanner* on behalf of Gonzales Broadcasting, Inc.; *Steven Yelverton* on behalf of Bolton Broadcasting Limited; *William Benton* on behalf of Voth Broadcasting Company; *J. Dominic Monahan* and *Peter Doyle* on behalf of Radio Mableton Limited; *Thomas A. Hart, Jr.,* on behalf of Metropolitan Management Corporation; *Lawrence J. Bernard* on behalf of Lorenzo Jelks; *James Winston, Walter Diercks* and *Desmond P. Brown* on behalf of QRW Partners Limited Partnership; *Grier C. Raclin, James K. Edmundson,* and *Kevin S. DiLallo* on behalf of Hairston Broadcasting Limited Partnership; *James J. Freeman, Mary V. Huff* and *Joel Laiks* on behalf of Mableton Communications Ltd.; and *Norman Goldstein* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: April 3, 1990; Released: April 11, 1990

INTRODUCTION

1. Ten applicants out of eighteen remain in this comparative contest for Channel 273A (102.5 MHz), Mableton, Georgia; (1) Mableton Broadcasting, Inc. (MBC); (2) Gonzales Broadcasting, Inc. (Gonzales, GBI or GBC); (3) Bolton Broadcasting, Limited (Bolton or BBL); (4) Voth Broadcasting Company (Voth); (5) Radio Mableton, Limited (RML); (6) Metropolitan Management Corporation (Metropolitan or MMC); (7) Lorenzo Jelks (Jelks): (8) QRW Partners Limited Partnership; (9) Hairston Broadcasting Limited Partnership (Hairston or HBLP); and (10) Mableton Communications Limited (MCL).

2. After the interlocutory cycle had run its course, and the faltering applications had been dismissed, evidence was taken on the following nine factual issues and the ultimate conclusionary issue:

Jelks-1: To determine whether Lorenzo Jelks is financially qualified to be a Commission licensee;

Jelks-2: To determine whether Lorenzo Jelks misrepresented the facts to the Commission on July 10, 1987, when he represented that he would ". . . file an amendment relating to his financial qualifications in the near future," and if so, what effect that has on Jelks' qualifications to be a Commission licensee;"

Hairston-1: To determine whether Hairston Broadcasting Limited Partnership is financially qualified;

Hairston-2: To determine whether on August 31, 1987 Hairston Broadcasting Limited Partnership falsely certified its financial qualifications;

Hairston-3: To determine whether on September 1, 1987, Hairston's purported lender, Atlantic Coast Equities, had sufficient net liquid assets to fund the proposed loan to Hairston Broadcasting Limited Partnership;

Hairston-4: If a final environmental impact statement is issued with respect to Hairston in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 CFR Sections 1.1301-1319;

MCL-1: To determine whether MCL has reasonable assurance that their proposed transmitter/tower site is available, and if not, whether MCL is qualified to be a Commission licensee;

MCL-2: To determine whether MCL has misrepresented the facts or lacked candor with the Commission about the availability of their proposed transmitter/tower site;

Comparative: To determine which of the proposals would, on a comparative basis, best serve the public interest; and

Ultimate Issue: To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

3. There are two other matters that must be considered under the standard comparative issue. First, the Chief, Audio Services Division has called for comparative coverage evidence. *See* 53 F.R. 35903 published September 15, 1988 at paragraph 14. Secondly, the commission wants certain environment factors; namely, Hairston's and Voth's[1] radio frequency (RF) radiation violations considered under the standard comparative issue. *See* Environmental Rules, 60 RR 2d 13 (1986) at paragraphs 8 and 20; FCC 88M-3587, released October 26, 1988; and FCC 88M-4189 released December 7, 1988.

4. We held the Prehearing Conference on December 13, 1988, and the Evidentiary Admission Session on January 24,

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[1] But see the Preliminary Ruling *infra.*, where Voth''s application is dismissed for failure to prosecute.

1989. The Phase I and II hearings were held on February 21, 22, 23, 24, 27 and 28, 1989, and on March 1, 2, 3, 6, 7, 8, 9, 10 and 13, 1989. The Phase III hearings were held on June 1 and 2, 1989. We first closed the record on June 2, 1989 (FCC 89M-1636, released June 9, 1989).

5. The ten applicants along with the Mass Media Bureau filed Proposed Findings of Fact and Conclusions of Law on August 4, 1989.[2] All of the applicants except for Voth, RML, and Jelks, filed Reply Findings.

PRELIMINARY RULING

6. Before proceeding to the findings of fact, a preliminary ruling is in order: Voth Broadcasting Company's application (BPH-870710MF) IS DISMISSED for failure to prosecute. Voth has done absolutely nothing to aid us in our search for the truth. At the outset Voth proffered a late-filed integration statement that failed to comply with the Prehearing Order. In fact it was so devoid of any of the requisite data that Voth's opponents couldn't adequately engage in pre-trial discovery or pre-trial preparation. So that late-filed Integration Statement was rejected, and Voth was credited with 0% integration. *See* FCC 88M-3523 released October 21, 1988.

7. Next, Voth wasn't prepared to exchange his direct case exhibits at the prehearing conference. *See* Tr. 32-34. When Voth finally exchange their exhibits, they were both fragmentary and incomplete. For example, Voth never supplied the dates-of-birth of any proposed integrated principals, although they were expressly directed to do so (Tr. 64, 154), and never did, and still haven't given us a specific integration proposal – even as an offer of proof.

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[2] The Mass Media Bureau's findings were limited to the comparative coverage issue. *See* paragraph 3 *supra*.

8. Next, aside from the December 13, 1988 prehearing and the January 24, 1989 evidentiary admission session, Voth did not attend any of the many hearing sessions that were held in this case. *See* paragraph 4 *supra*. So it couldn't and didn't offer any assistance to the resolution of the many issues we faced.

9. Finally Both was expressly directed to file proposed findings of fact on all outstanding issues. *See* Tr. 5986-5987; Tr. 6480-6481. They not only did not do so, they didn't even try to do so. Thus, they have failed to prosecute their application, dismissal for failure to prosecute is warranted, and Voth will not be considered further. So for all practical purposes we will proceed with nine applicants.[3]

FINDINGS OF FACT

JELKS - 1: FINANCIAL QUALIFICATIONS

10. Under Issue Jelks-1, we must determine whether Lorenzo Jelks is financially qualified to be a Commission licensee. When Jelks was preparing his application (BPH-870710MZ) he was asked whether he had sufficient net liquid assets on hand or available from committed sources to construct and operate his requested facility for three months without revenue. He answered "no." But then he added this

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[3] More and more we are getting applicants in cases that have absolutely no *realistic* chance of prevailing. *See e.g. Ronald Sorenson,* FCC 89D-40, released September 22, 1989. There two of the applicants, Asterisk and Clear Channel each had decisive diversification demerits against them, and were claiming no integration of ownership with management. Their chances of winning that six-applicant proceeding were slim to nil. Yet they burdened the Commission's processes by remaining in the case. The cynic would say such type applicants were waiting for a pay-off. But even assuming these applicants have the best of motives, why should they be permitted to burden the Commission's processes in this way?

statement: "Applicant will file an amendment relating to his financial qualifications in the near future." That's what he said he was going to do. But he never did. And according to Presiding Officer's records, he still hasn't.

11. During the hearing Jelks tried to introduce an exhibit (Jelks Exhibit 5) entitled "Financial Qualifications of Lorenzo Jelks." That proffer was rejected because it varied from his application (Tr. 4110-4122).

12. At the hearing it also developed that Jelks didn't prepare a budget before completing his application; and he never computed the number of people he'd have on his staff. In fact, his application and his rejected financial exhibit even conflict about the number of people he proposes to hire. Jelks didn't submit a Model EEO Program with his application because he proposed employing less than five people. But at the hearing he proposed employing five people. Jelks still hasn't submitted a Model EEO Program (Tr. 4147-4150).

13. *Jelks - 1: Intermediate Findings.* Findings 10-12 make it abundantly clear that Lorenzo Jelks is not now and never has been financially qualified. His application still shows that he does not have sufficient net liquid assets on hand or available from committed sources to construct and operate his requested facility for three months without revenue.

JELKS - 2: FINANCIAL MISREPRESENTATION ISSUE

14. As previously noted (Finding 10 *supra.*) on July 10, 1987, when he filed his application, Lorenzo Jelks represented to the Commission that he would " . . . file an amendment relating to his financial qualifications in the near future." Over a year later (on September 8, 1988) Jelks still hadn't filed that financial amendment. And as previously noted (Findings 12 *supra.*), he still hasn't.

15. In any event, on November 16, 1988, the Presiding Officer called on Jelks to explain why he never lived up to his July 10, 1987 representation. *See* FCC 88M-3900. At the hearing Jelks was unable to adequately explain why he didn't amend his application as he represented he would. The record shows that it wasn't until late 1987 about five months after he filed his application that Jelks received an acceptable loan commitment letter from his communications counsel (Jelks Ex. 6, p. 2; Tr. 4167). But he made no *concerted* effort to secure a loan letter that would pass Commission muster until the summer of 1988 (Tr. 4157-4158, 4171), and he didn't try to enlist his counsel's help in obtaining an adequate bank letter until the late fall of 1988 – well after Gonzales has filed its Petition to Enlarge Issues against him (Tr. 4191-4194). Jelks was well aware all along of the representation he had made in BPH-870710MZ; i.e., that he would file a financial amendment " . . . in the near future."

16. *Jelks - 2: Intermediate Findings:* Based on the record evidence, it's apparent that Lorenzo Jelks never tried to live up to his July 10, 1987 representation that he would " . . . file an amendment relating to his financial qualifications in the near future." He was aware that he'd made that representation. But he never really made a serious effort to fulfill it or carry it out until some 15 months later. And, as previously noted (Finding 10 *supra.*) he never has so amended his financial certification. Thus, Lorenzo Jelks hasn't prosecuted his application in a manner that befits a prospective broadcast permittee. So even *assuming* that he was financially qualified (but see Findings 10-13 *supra.*), his application would still be denied. He simply lacks the necessary character qualification.

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143. *Lorenzo Jelks.* Lorenzo Jelks (Jelks) is an individual applicant. Although the record shows that Jelks is not basically qualified to be a Commission licensee. (see Findings 10-13 *supra* and 14-16 *supra.*), no one has questioned his ownership structure.

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175. *Lorenzo Jelks.* Jelks owns the *AUC Digest*, a weekly newspaper published in Atlanta. The newspaper has a circulation of 10,000, mainly students in the Atlanta University Center. It is a for-profit entity, selling advertising and showing a slight profit.[43] Jelks doesn't receive a salary from the *AUC Digest*, but he does receive expenses. He is the *Digest's* only employee. He says he will resign from the newspaper if his application is granted. Lorenzo Jelks has no other cognizable ownership interests in or association with any other media of mass communications.

176. So assuming that Jelks were basically qualified to be a Commission licensee (but see Findings 10-13 and 14-16 *supra.*), he would be assessed a comparative demerit under the diversification criterion.

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241. *Lorenzo Jelks.* Lorenzo Jelks has been disqualified on two basic issues. (*See* Findings 10-13, and 14-16 *supra.*). However, the following comparative findings would apply to his application (see Footnote 56).

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[43] Jelks never reported his newspaper ownership in his application (Tr. 4145). And according to the Presiding Officer's records, he has never amended his application to reflect that ownership.

242. Lorenzo Jelks, sole owner, will integrate himself into the proposed station's day-to-day operations as General Manager. He'll work full- time (at least 40 hours a week). As General Manager he'll establish all station policies, make all the personnel decisions, obtain financing for the station,[55] and supervise the station's finances, supervise the station's day-to-day operation, and supervise and direct all station employees.

243. Lorenzo Jelks has lived in Atlanta from 1955-1961 and from 1965 to the present. He does not propose to move to Mableton if his application is granted. He claims past broadcast experience. In 1962, he was a staff announcer at Station WHBI(FM), Newark, New Jersey. From 1965-1967 he worked at WIGO(AM), Atlanta. There he produced and announced news and public affairs programs. He became a assignment reporter for that station for five and one-half years. He also operated a carrier-current radio station at Atlanta University Center for ten years.

244. Jelks has been civically active in the Atlanta area. He has been a member and supporter of the Butler Street YMCA in Atlanta. But it appears that that was back in 1972. In 1986 he was an unsuccessful candidate for Georgia state senator from the 39th District. He is also a member of the Atlanta Chapters of the NAACP and the Urban League.

245. Lorenzo Jelks seeks comparative enhancement for being a Black male.

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[55] Isn't it a little bit late to be carrying out this task? *See* Findings 10-16 *supra*.

ULTIMATE FINDINGS OF FACT AND PRELIMINARY CONCLUSIONS OF LAW

1. Nine applicants [57] remain in the battle for Channel 273A in Mableton, Georgia: (1) Mableton Broadcasting, Inc. (MBC); (2) Gonzales Broadcasting, Inc. (Gonzales, GBI or GBC); (3) Bolton Broadcasting Limited (Bolton or BBL); (4) Radio Mableton Limited (RML); (5) Metropolitan Management Corporation (Metropolitan or MMC); (6) Lorenzo Jelks (Jelks); (7) QRW Partners, Limited Partnership (QRW); (8) Hairston Broadcasting Limited Partnership (Hairston or HBLP); and (9) Mableton Communications Limited (MCL).

2. The parties adduced evidence on eight factual issues. Seven of those issues were basic qualifying issues, and the eighth was the standard comparative issue. Of the seven basic qualifying issues, two are against Lorenzo Jelks (Jelks 1 and 2); three are against HBLP (Hairston 1, 2 and 3);[58] and two against Mableton Communications Limited (MCL 1 and 2).

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9. *Lorenzo Jelks.* Jelks faced two basic qualifying issues, a financial qualifications issue, and a financial misrepresentation issue (Jelks -1 and Jelks-2). He could satisfy neither. When he filed his application on July 10, 1987, Jelks admitted that he wasn't financially qualified. He admitted tha the didn't have sufficient net liquid assets on hand or from committed sources to construct and operate the proposed facility for three months without revenue. He has never

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[57] A tenth applicant Voth Broadcasting Company's application was dismissed for failure to prosecute. *See* Findings 6-9 *supra.*

[58] A contingent *basic* qualifying issue (an RF radiation issue) against Hairston was dismissed. *(See* Finding 50 *supra.*).

amended his application to state otherwise. So Jelks is not financially qualified, and his application must be denied. *See* Findings 10-13 *supra.*

10. Even *assuming* that Jelks were financially qualified, his application would still be denied under Jelks-2. When he filed his application on July 10, 1987, Jelks admitted that the wasn't financially qualified but he rerepresented that he would " . . . file a financial amendment in the near future." He never did. Over a year later (when the case was designated for hearing on December 8, 1988), he still hadn't. He still hasn't. The record clearly shows that Jelks did not make this representation in good faith. The misrepresentation that Lorenzo Jelks made under Jelks-2 leads independently to the conclusion that he is not fit to be a Commission licensee, and mandates denial of his application. *See* Findings 14-16 *supra.*

11. Since Lorenzo Jelks is disqualified for either of two reasons, his application will not be considered any further.[65]

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THE STANDARD COMPARATIVE ISSUE

24. With the elimination of Jelks, Hairston, and MCL, six applicants remain for comparative consideration:" (1) MBC; (2) Gonzales; (3) BBL; (4) RML; (5) MMC; and (6) QRW. These six will be analyzed under the criteria set out in the Commission's *1965 Policy Statement on Comparative Broadcast Hearing*, 1 FCC 2d 395 as modified by subsequent Review Board and Commission decisions.

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[65] Had he been qualified, Jelks would have received a diversification demerit under the standard comparative issue. *See* Findings 175-176. *supra.*

ULTIMATE CONCLUSIONS

37. Under the ultimate conclusions we must determine which application should be granted. It's no contest, BBL's application is by far superior to GBC's and MMC's. BBL is clear from a diversification standpoint, and they made their 100% quantitative integration claim stand. That puts them decisively ahead of GBC and MMC who are entitled to no quantitative integration credit whatsoever.

38. So we needn't evaluate criteria 3 and 4 under the best practicable service objective; i.e., qualitative integration and female and/or minority enhancements. *See New Continental Broadcasting Co.*, 88 FCC 2d 830, 50 RR 2d 1117 (1981); *Van Buren Community Service*, 87 FCC 2d 1018, 50 RR 2d 115 (1981); and *Cannon Point Broadcasting Co.*, 93 FCC 2d 643 (R. Bd. 1983) at 649.[70] Bolton Broadcasting Limited is declared the winner of this comparative marathon.

39. Even though criteria 3 and 4 aren't being considered this doesn't mean that BBL is deficient under those standards. BBL's general partner, Janet Bolton, is a Black female who can claim both local residence, and civic participation. *See* Findings 228-232.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion, Bolton Broadcasting Limited's application (BPH-870710MD) IS GRANTED; and

The applications of Mableton Broadcasting Company, Inc. (BPH-870706ML), Gonzales Broadcasting Inc. (BPH-870707MJ), Voth Broadcasting Company (BPH-

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[70] Note, however, that comparative findings have been made on all four of the best practicable service criterion. It's only further comparative conclusions that aren't needed. *See* Footnote 52 *supra*.

870710MF), Radio Mableton Limited (BPH-87-710MT), Metropolitan Management Corporation (BPH-870710MY), Lorenzo Jelks (BPH-870710MZ), QRW Partners Limited Partnership (BPH-870710NF), Hairston Broadcasting Limited Partnership (BPH-870710NO), and Mableton Communications Limited (BPH-870710NQ) ARE DENIED.[71]

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

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[71] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, this Initial Decision will become effective 50 days after its public release. *See* 47 CFR 1/2(d).

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MM Docket No. 88-400

In re Applications of

File No. BPH-870706ML
MABLETON BROADCASTING COMPANY, INC.

File No. BPH-870707MJ
GONZALES BROADCASTING, INC.

File No. BPH-870710MD
BOLTON BROADCASTING LIMITED

File No. BPH-870710MF
VOTH BROADCASTING COMPANY

File No. BPH-870710MY
METROPOLITAN MANAGEMENT CORPORATION

File No. BPH-870710MZ
LORENZO JELKS

File No. BPH-870710NF
QRW PARTNERS LIMITED PARTNERSHIP

File No. BPH-870710NQ
MABLETON COMMUNICATIONS, LIMITED

For a Construction Permit for a New FM Station
on Channel 273A (102.5 MHZ),
Mableton, Georgia

Appearances

Joseph A. Belisle on behalf of Mableton Broadcasting Company, Inc.; *Dennis F. Begley, Matthew H. McCormick* and *Troy F. Tanner* on behalf of Gonzales Broadcasting,

Inc.; *Steven Yelverton* and *John W. Hunter* on behalf of Bolton Broadcasting Limited; *Lind Carl Voth, pro se,* on behalf of Voth Broadcasting Company; *Margaret L. Tobey* and *Paula G. Friedman* on behalf of Metropolitan Management Corporation; *Lawrence J. Bernard* on behalf of Lorenzo Jelks; *Clarence E. Dilday* on behalf of QRW Partners Limited Partnership; *Ralph C. Crossley, pro se,* on behalf of Mableton Communications Limited; and *Norman Goldstein* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

Adopted: October 14, 1993; Released: October 22, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL and GREENE.

Board Member BLUMENTHAL:

1. The Board has before it: (1) the *Initial Decision,* 5 FCC Rcd 2472 (1990) (*I.D.*), and the *Supplemental Initial Decision,* 7 FCC Rcd 4431 (1992) (*S.I.D.*), both issued by Administrative Law Judge Walter C. Miller (ALJ); and (2) the exceptions and reply pleadings filed by the above-captioned parties and directed to the *I.D.* as well as the *S.I.D.*[1] It also has a number of associated motions and pleadings that will receive appropriate disposition hereinbelow.

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[1] In this *Decision,* the remaining parties will be identified at most times as follows: Mableton Broadcasting Co., Inc. ("MBC"); Gonzales Broadcasting, Inc. ("Gonzales"); Bolton Broadcasting Limited ("BBL"); Voth Broadcasting Co. ("Voth"); Metropolitan Management Corp. ("MMC"); Lorenzo Jelks ("Jelks"); QRW Partners Limited Partnership ("QRW"); Mableton Communications Limited ("MCL"). In this *Decision* also, exceptions and replies to the *I.D.* will be identified as "Exceptions" and "Replies"; as to the *S.I.D.*, these will be designated "*S.I.D.* Exceptions" and "*S.I.D.* Replies."

BACKGROUND

2. Eighteen (18) applicants originally filed for this Georgia frequency, but only ten (10) remained by April 1990. *I.D.*, para. 1. After the initial hearing, the *I.D.* opined that Bolton Broadcasting Limited (BBL) was the comparatively superior applicant. Upon review of the many exceptions to the *I.D.*, the Board took two fundamental actions. *First*, we found fatal flaws in the ownership proposal of BBL's purported limited partnership, which determination the Board believed would effectively remove BBL from the competition for this channel. *Mableton Broadcasting Co., Inc.*, 5 FCC Rcd 6314 6314-17 (Rev. Bd. 1990)(*Remand Order*).[2] In view thereof, the Board found it unnecessary to remand BBL's application for supplemental hearing on several basic qualifying issues exposed on the record of the initial hearing.[3]

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[2] The Board notes that, in *Marlin Broadcasting of Central Florida, Inc. v. FCC*, 952 F.2d 507, 511 (D.C. Cir. 1992), the court specifically cited our 1990 *Remand Order* in this case for the proposition that the FCC must "identify and eliminate from participation those applicants who are not *bona fide.*" However, we are certain that the *Marlin* court has not prejudged any appeal BBL might take from our *Remand Order*, and that BBL retains all of its future appellate rights. On the other hand, to the degree that the *S.I.D.* (at para. 62-66) is inconsistent with the Board's *Remand Order* disposition of BBL, the ALJ's language is merely intemperate surplusage and will be disregarded.

[3] Our *Remand Order* expressed the view that "[b]ut for the fact that our denial of integration' credit . . . will likely preclude it from prevailing," our remand would have included "abuse of process and/or misrepresentation issues" against BBL. *See* 5 FCC Rcd at 6324 n.12. A further hearing would be necessary on such issues before BBL could be found basically qualified. *See generally Royce Int'l. Broadcasting*, 5 FCC Rcd 7063, 7065 n.6 (1990) (egregious misrepresentation of ownership structures) (subsequent history omitted). Such a hearing would necessarily include a basic financial issue also, in light of Ms. Bolton's testimony that she had no idea how her alleged "partners" would provide construction or operating funds. *See Remand Order*, 5 FCC Rcd at 6315-16.

3. *Second*, we were foresquare in unison with those applicants whose exceptions to the *I.D.* echoed a singular theme, to wit: whereas "numerous petitions to enlarge issues were filed alleging various *basic, qualifying* defects in the parties' application . . . [e]ach of these pleadings was denied as an unjustifiable attempt to restructure the proceeding."[4] But, notwithstanding the ALJ's refusal to add basic qualifying issues as requested by the respective parties, the *I.D.* routinely derogated various of the applicants on such assorted basic issues as finances, transmitter sites and character, dealing with such issues ostensibly under the *comparative* factor of ownership/management integration. Consequently, the Board was compelled to remand this proceeding on basic qualifying issues against three of the applicants who appeared on this record to be potentially competitive on a *comparative* basis, should they be found basically qualified. *See Remand Order, passim.*[5]

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[4] MBC Exceptions at 5 (emphasis added). The ALJ did originally add basic qualifying issues against three applicants. *I.D.* at para. 2. But, he refused to add basic issues against any other applicant. *See also, e.g.*, Gonzales Exceptions at vi, 35-44; BBL Exceptions at 19-20, 25-26; RML Exceptions at ii, 24-29. We have already commented upon these errors, *see Remand Order*, 5 FCC Rcd at 6314, 6323.

[5] The ALJ had complained:

> Anyone who studies this voluminous evidentiary record will soon discover that from both an academic and public interest standpoint this wasn't a well-tried case. On a scale of 0 to 10 (10 being a well-tried case), this one rates about a 4. Now it wasn't that we lacked skilled attornies [sic]. We had a roomful of talent. Rather it was the way these advocates *elected* to try their case.

Id., Concls. at para 3 (footnotes omitted; original emphasis). Whatever the accuracy of that lament, and as signified in our *Remand Order*, neither was the case "well-tried" by the ALJ, whose scatter-gun treatment of the applicants was partially described in out *Remand Order* and will be further discussed in this text as we deal specifically with certain individual applicants.

4. The critical combined results of the *I.D.* and the *S.I.D.* were as follows: the ALJ (1) denied integration credit to MBC; (2) denied integration credit to Gonzales; (3) granted integration credit and recommended award of this construction permit to BBL; (4) dismissed Voth for failure to prosecute; (5) denied integration credit to MMC; (6) disqualified Jelks on financial and misrepresentation issues; (7) disqualified QRW on a financial and misrepresentation issues; and (8) disqualified MCL on a financial issue. Having treated sufficiently with BBL in our *Remand Order*, and upon review of this entire record and the parties' pleadings, we hold that Gonzales is the comparatively superior applicant under the yet-prevailing precepts of the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). Because we so hold, and believe therefore that many of the remaining exceptions are either without merit or non-decisional, we turn first to Gonzales and then address, to the extent decisional, the exceptions of the other six parties.

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20. *JELKS.* Reminiscent of cases such as *Carol Sue Bowman*, 6 FCC Rcd 4727 (1991), and the companion case of *Sharon Annette Haley*, 6 FCC Rcd 4630 (1991), *consolidated appeals denied mem. sub. nom. Prater & Durham v. FCC*, 983 F.2d 298 (D.C. Cir. 1992),[36] as well as the earlier case of *Edwin A. Bernstein*, 5 FCC Rcd 2843 (1990), *aff'd per judgment sub. nom. Lefebvre v. FCC*, 926 F.2d 1215 (D.C. Cir. 1991), Jelks filed his instant application with the certification that he was *not* financially qualified,[37] but his application averred: "Applicant will file an amendment relating to his financial qualifications in the near

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[36] By coincidence, perhaps, counsel in the two *Prater & Durham* cases also represents Jelks in this proceeding.

[37] Prior to its *Revision of Application* (FCC Form 301), 4 FCC Rcd 3853, 3859, (1989) and despite its then-extant "hard look" application

future." *I.D.* at para. 11. As the ALJ reports, "he never did," *id.*, and the ALJ elaborates that (*id.*, at para. 15; original emphasis):

> [i]n any event, on November 16, 1988, the Presiding Officer called on Jelks to explain why he never lived up to his July 10, 1987 representation. *See* FCC 88M-3900. At the hearing Jelks was unable to adequately explain why he didn't amend his application as he represented he would. The record shows that it wasn't until late 1987, about five months after he filed his application, that Jelks received an acceptable loan commitment letter from his communications counsel (Jelks Ex. 6, p.2; Tr. 4167). But he made no *concerted* effort to secure a loan letter that would pass Commission muster until the summer of 1988 (Tr. 4157-4158, 4171). and he didn't try to enlist his counsel's help in obtaining an adequate bank letter until the late fall of 1988 — well after Gonzales has filed its Petition to Enlarge Issues against him (Tr. 4191-4194). Jelks was well aware all along of the representation he had made in BPH-870710MZ; *i.e.*, that he would file a financial amendment ". . . in the near future."

The ALJ held that not only was Jelks disqualified on financial grounds, this applicant also misrepresented on his application that he would amend his finances "in the near

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processing requirements and 47 CFR 73.3564 (completeness of applications); *see also, e.g., Malkan FM Associates v. FCC,* 935 F.2d 1313 (D.C. Cir. 1991) (summary application dismissal for *slighest* deficiency under "hard look"); *Russian River Vintage Broadcasting v. FCC,* No. 92-1236 (D.C. Cir. Oct. 8, 1993), it was at that time the practice of the Mass Media Bureau's processing line staff to accept as "complete" an FM radio station application with a negative financial certification. The Commission's 1989 *Revision of Application* ended that troublesome practice.

future." *I.D., Concls.*, paras. 9-10. Finally, the ALJ reported that Jelks filed no amendment by the December 1988 hearing designation, and had not even done so by the April 1990 date of the *issuance* of the *I.D. See id.*

21. *Discussion.* While admitting that, irrespective of his 1987 application oath to file a financial amendment expeditiously "[n]o such amendment was [ever] filed." Jelks Exceptions at ii, Jelks argues (1) that — exactly as in *Edwin A. Bernstein* and *Sharon Annette Haley* — the Mass Media Bureau's hearing designation order mistakenly neglected to specifically note a financial issue against Jelks; and (2) that after the ALJ granted an opponent's motion to add a financial issue (and *sua sponte* added a related misrepresentation issue), Jelks later attempted to exchange an exhibit purporting to show that he was (by that time) financially qualified. Because Jelks made no attempt to either amend his application or show "good cause" for such an amendment as required under 47 CFR § 73.3522, the ALJ sustained an objection to Jelks' belated attempt to enter his purported finances by simple exhibit exchange on March 7, 1989. *See* Jelks Exceptions at 4-6.

22. As we did in *Bernstein* and *Haley*, we shall disregard the weak technical plaint that the Bureau's designation order mistakenly neglected to formally note a financial issue against Jelks. In *Cleveland Television Corp v. FCC*, 732 F.2d 962 (D.C. Cir. 1984), the court brushed away an analogous argument from the Commission itself, *see* 732 F.2d at 965 N.2, 969-970; and, just as in *Cleveland, Bernstein* and *Haley*, Jelks does not and cannot deny notice of his own declared awareness of either his negative 1987 financial certification or his need (nay, sworn promise) of a timely application amendment.[38] Jelks' 1989 attempt to slip some &

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[38] *Mirabile dictu,* Jelks relies heavily upon a staff rulung, *City Light Communications,* 65 RR 2d 1783 (Mass Media Bur. 1989), where as to an initial negative financial certification the Bureau opined:

purported financial data into an exhibit, in disregard of his own application pledge and the express "good cause" requirements of § 73.3522(b)(1), shall avail Jelks no more than it did the applicants disqualified in, for example, *Bernstein, Haley* and *Bowman*. The Commission long ago trumpeted that it would not "temporiz[e] with flawed proposals," *Chudy Broadcasting Corp.*, 58 RR 2d 133, 134 n.7 (1985); we harken again to that clarion and deny Jelks' exceptions.

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24. The critical problem with QRW's exceptions on that issue is that, whereas it insists repeatedly that is a *bona fide* limited partnership under the stewardship of "general" partner Gloria Watkins,[40] Ms. Watkins' hearing testimony at the two hearings proved irrefragably (1) that her personal financial certification of QRW's application was, at best, disingenuous; and (2) equally at best, her understanding of QRW, its ownership equity distribution and/or the role of its "limited" partners, as well as QRW's financing was all but non-existent. Viewed in a less forgiving light, QRW might be entitled to the colorful opprobrium visited upon it in the *I.D.* and *S.I.D.* We need not go that far, however, to easily affirm the disqualification of QRW on the basic financial issue.

> The remedy for failure to certify is not dismissal, *but amendment or, failing that, specification of a financial qualifications issue* against the relevant applicant.

Jelks Exceptions at 14-15 (Jelks' emphasis). But, clearly nothing in the Bureau's *City Light* ruling negated the Commission's amendment requirement of § 73.3522 of the rules, nor could it of course. *See Radio Associated, Inc.*, 6 FCC Rcd 2094 (Rev. Bd. 1991) (cited with reliance in the Commission's *Sharon Anneue Haley* brief).

[40] QRW claims three "limited" partners: William Dilday, Henry Flowers and Porter Sanford. *S.I.D.*, para x2.

25. *Discussion.* The Board adopts and incorporates by reference the findings of fact set forth in paras. 78-120 of the *S.I.D.*, none of which are disputed directly by QRW nor contradicted by the underlying record. In summary, we find the following facts to be especially probative, particularly in light of the totality of the ALJ's *S.I.D.* findings, in support of the ALJ's adverse conclusions under the basic financial issue: (1) Watkins prepared no construction or operating budget before QRW filed, but relied instead upon (former) counsel's oral suggestion that $500,000 would be needed, *see id.*, para. 80; (2) after being turned down for a loan by a Jackson, Mississippi bank on Watkins' purely oral request, *id.*, para. 81, QRW "limited" partner Porter Sanford suggested that she contact Sun-Delta Capital Access Center, Inc. and speak to its Howard Boutte, from whom she also asked orally a $500,000 loan letter, *id.*, paras. 82-84; (3) however, she provided Boutte no proposed budget, no business plan and/or other financial documentation or a loan application, but she nevertheless certified QRW's FCC application on the same day (July 8, 1987) she sent a letter to Sun-Delta requesting a $500,000 loan letter, *id.*, paras. 85-86[41]; (4) despite the fact that Sun-Delta would ordinarily require "a business plan, a personal balance sheet, a budget and evidence of creditworthiness on the borrower's part," *id.*, at para. 89, Boutte provided Watkins with a letter purporting to offer QRW a $300,000 (not $500,000) loan, but that letter also contained the express condition that "*Sun-Delta reserves the right to require any equity participation in the* [QRW] *project . . .*," *id.*, at para. 88 (empha-

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[41] The ALJ found material contradictions between Watkins' original hearing and supplemental hearing testimony over Watkins' financial certification timing, and the dispatch of her loan request letter to Sun-Delta. *See I.D.*, paras. x5-x6. In any event, no financial documentation was contemporaneously submitted to Sun-Delta, *see id.*

sis added); (5) although (former QRW counsel advised Watkins that a $300,000 loan was insufficient to cover the "budget" counsel had himself anticipated, and notwithstanding having been unaware of Sun-Delta's critical loan terms. Watkin's certified QRW's finances in the affirmative anyway, *see id.*, paras. 91-93; (6) moreover, Watkins did not have (or ever see) the financial statements of her "limited" partners at the time of QRW's financial certification, and she never verified *their* financial ability to support the QRW project, *see id.*, paras. 97-101; and (6) not only had Watkins never done business with either Sun-Delta or Boutte, she knew *nothing* pertinent at hearing about Sun-Delta itself (she thought it was "some type of MESBIC" or "office or company or organization"), and admitted that she "had no idea" whether the $300,000 would be available from it, *see id.*, paras. 105-107, never even giving much thought to Sun-Delta's *express* reservation of QRW equity (or the potential magnitude thereof). *Id.*, para. 108.[42]

26. To put it charitably, QRW failed at hearing to prove it had met the Commission's routine financial certification requirements (outlined *supra*, para. 18, in our MMC discussion). Even assuming QRW was intended as some sort of "limited" partnership, its sole "general" demonstrated no

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[42] QRW's (formar) counsel obtained in March 1991 a second letter from Dun-Delta, saying it would take a passive equity in QRW of no more than 30%, *see S.I.D.*, paras. 115-116, but Watkins never consulted with, or advised, her "limited" partners of this potential equity arrangement and could not personally affirm that they even received copies of that 1991 Sun-Delta letter. *Id.* Additionally, Boutte testified that he never informed QRW's principls about Sun-Delta's usual requirements of a cash equity contribution prior to a loan, and two of QRW's (three) "limited" partners testified that they had no knowledge of that significant capital requirement either. *Id.*, para. 11x. For her part, the ALJ reports that "Watkins still isn't sure whether she'll be a 5% or 10% general partner." *Id., Concls.* at para. 40.

more than a vague idea of the costs of its proposed station, no principal ever prepared or verified a serious budget; and QRW's appreciation of Sun-Delta financing on which it casually and prematurely relied was nil, as was any resulting QRW equity structure or source of shortfall funding. Affirming QRW's disqualification under the basic financial issue, we need not here address the exceptions to the adverse character findings set forth in the *S.I.D.*, paras. 37-42. QRW is, for all decisional purposes, eliminated from consideration for this permit.

27. *MABLETON COMMUNICATIONS, LTD.* Having overruled the *I.D.* on a transmitter site issue in our *Remand Order*,[43] we nevertheless accorded with those exceptions complaining of the ALJ's failure to add a basic financial against MCL for those reasons explicated in our prior order. *See* 5 FCC Rcd at 6321-6322. In brief, MCL is a composite of two settling applicants who effectively reapplied here with a (nominal) structure composed of individual applicant Ralph C. Crossley, Jr. (95% MCL equity), and Skywave Communications Corp. (5% MCL equity), the latter an entity (led by Leon R. Perkinson) which had filed applications in at least ten other FM radio markets (*see S.I.D.*, para. 144) for FM construction permits using identical (though dubious) "limited" partnership structures. *See generally, e.g., Evansville Skywave, Inc.*, FCC 93R-46, released September 20, 1993 (*as corrected*). Much as in *Evansville* and several other "Skywave" applications, Ralph

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[43] In view of his adverse findings on the transmitter site issue, the ALJ had merely assumed that MCL's principal, Ralph C. Crosslley, Jr., had necessarily made a parallel "false financial certification," a leap of judgment the Board refused to join. *See Remand Order*, 5 FCC Rcd at 6320. We also relieved MCL of a media "diversification" demerit levied by the ALJ. *See id.*, at 6321.

Crossley's *personal* financial certification here on behalf of MCL was allegedly based upon "reasonable assurance" of a construction and inaugural operating loan from Anthony P. Schlichte, formerly associated with Bank One, Indianapolis, Indiana. And, also as in *Evansville*, Schlichte in turn claimed to have known Skywave's Leon Perkinson from dealings with Perkinson and his "investors" in connection with cellular radiotelephone applications filed by Midwest Mobilephone in the early-to-mid 1980's. Because only Crossley attested to MCL's finances, but appeared to have had little personal contact with Bank One prior his MCL financial certification, we remanded this application to the ALJ for a full evidentiary hearing on an appropriate issue.

28. Upon remand, the ALJ tried a basic financial issue against MCL, and his findings thereunder are laid out in paras. 136-168 of the *S.I.D.* At the supplemental hearing, Crossley could not produce any 1987 MCL budget; he produced only a single page from a "business plan"—created *post-hoc* in 1990—calling for $650,000 in projected equipment expenses. *S.I.D.*, para. 142. Howbeit, Crossley testified that he had advised Bank One's Schlichte in July 1987 that he needed a loan letter in the amount of only $250,000. *See id.*, para. 141. But the record further reflects that Bank One had no relevant written documentation on this particular Mableton applicant; that Schlichte issued a bank letter essentially upon a 30-second phone call from Perkinson to Schlichte in which no salient information about 95% MCL principal Crossley was transmitted; that none of Skywave's (18) "investors" had yet cognizably agreed to personally underwrite any Bank One loan to MCL; that Schlichte did not even know what equity percentage Skywave would have in MCL; and that Crossley claimed it was not until Schlichte's March 1991 deposition that Crossley himself became aware that Bank One expected *him* to *personally* fund 20% of the project's cost before any loan

could be made *and* that Skywave's equity share would have to be *raised* from 5% to 25% *prior to* any prospective Bank One loan. Claiming a "misunderstanding," MCL attempted to switch reliance to a December 1989 letter from Trust Company Bank of Atlanta, but that second bank made demands ranging from a $150,000 infusion of capital from MCL to an SBA-guaranteed loan. Alas, for lack of suitable information on Crossley (or MCL's other "investors") and/or any indication as to whether MCL could or would meet Trust Company's several stiff loan conditions, Trust Company disclaimed at hearing any tentative willingness to commit to a loan agreement with MCL.

29. *Discussion.* On the record before us, we shall affirm the ALJ. MCL's exceptions argue that the Bank One letter was not a mere "accommodation" from Schlichte to Perkinson, relying squarely upon *Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978). In view of that steadfast reliance, it baldly asserts that "the amount of information Schlichte had about Crossley, is irrelevant"[44]; and, while Crossley claims he was—until Schlichte's deposition—totally unaware of his personal obligation to invest up to 20% ($50,000) prior to any Bank One loan, Crossley now says he is willing to sell his own house to meet that prerequisite. As to Bank One's unequivocal demand that Skywave's equity share be raised from 5% to 25%, MCL submits that the ALJ failed to note that Crossley and Perkinson "have [now] agreed to such an equity increase if Crossley pursues the Bank One loan and that this has been

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[44] MCL Exceptions to *S.I.D.* at [blank in original]. Although Crossley is here representing MCL *pro se*, it is evident that the exceptions were prepared by experienced communications counsel, the signature page alone having a different typeface and Crossley's signature.

communicated to and approved by Schlichte."[45] As a backstop, MCL also argues the validity of the Trust Company letter, despite that second bank's multiple conditions and the testimony of its loan officer, John Turgeon, that his Atlanta bank may well demand, *inter alia*, an SBA guarantee for any MCL loan.

* * * * * * * * *

CONCLUSION

31. As signaled in our opening paragraphs, we believe that the ALJ erred in denying all ownership/management integration credit to Gonzales, and hence the credit for local residence and civic activities that append thereto. Though we concur with the ALJ that Mrs. Polk's claim to an ethnic preference was insufficiently supported on this record (*see supra* note 18), Gonzales would prevail in any event, certainly after considering the adverse conclusions befalling its seven (7) residual competitors. In that latter regard, it bears special emphasis, we think, that these Mableton applications were filed at the apogee of the Commission's deregulatory experimentation with the comparative hearing process. That experimental latitude, unfortunately, resulted in an epidemic of abuse by hundreds of *faux* applicants and borderline ethical liberties taken by too many members of the bar. *See, e.g., Garden State Broadcasting Limited Partnership v. FCC*, No. 91-1043 (D.C. Cir. June 29, 1993)(court imposes costs upon dishonest, abusive broadcast applicant which brazenly filed triad of frivolous appeals). In successive reactions over the past several years, however, the Commission has taken a battery of remedial measures to deter purely

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[45] *Id.*, at 8. Of course, Schlichte is no longer with Bank One, and neither that bank not Schlichte have any records on this entire MCL matter.

speculative applications, *see, e.g., Revision of Application; supra; Settlement Agreements*, 6 FCC Rcd 85 (1990), *modified*, 6 FCC Rcd 2901 (1991), to thwart spurious applicants at the filing stage, and to police its licensing processes generally. *See, e.g., Proposals to Reform the Commission's Hearing Process*, 6 FCC Rcd 157 (1990); *clarified*, 6 FCC Rcd 3403 (1991); *Richard P. Bott, II, supra* note 14. As the overall record here attests, those remedial actions were well-warranted to restore a modicum of integrity to this hearing process, and most assuredly none too hasty.[47]

32. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed May 28, 1993 and August 3, 1993 by Gonzales Broadcasting, Inc. and filed July 7, 1993 by Mableton Broadcasting Co., Inc. ARE GRANTED, and the respective amendments ARE ACCEPTED for 47 CFR § 1.65 purposes only.

33. IT IS FURTHER ORDERED, That the petition for late acceptance filed May 14, 1990 by Mableton Communications, Limited and the motion for leave to file supplement to brief filed March 10, 1993 by Lorenzo Jelks ARE DISMISSED as moot; the motion to proceed in proper person filed July 15, 1993 by Voth Broadcasting Co. IS GRANTED; and the motion to strike filed July 19, 1993 by Mableton Broadcasting Co., Inc. IS DENIED.

34. IT IS FURTHER ORDERED, That the application of Gonzales Broadcasting, Inc. (File No. BPH-870707MJ) for a construction permit for a new FM station at Mableton, Georgia IS GRANTED; and the applications of Mableton Broadcasting Co., Inc. (File No. BPH-870706ML), Bolton

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[47] Mayhaps, too late. *See generally Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992), *but compare Reexamination of the Policy Statement on Comparative Broadcast Hearings*. 7 FCC rcd 2664. *Further Notice*, 8 FCC Rcd 5475 (1993).

Broadcasting, Limited (File No. BPH-870710MD), Voth Broadcasting Co. (File No. BPH-870710MF), Metropolitan Management Corp. (File No. BPH-870710MY), Lorenzo Jelks (File No. BPH-870710MZ), QRW Partners Limited Partnership (File No. BPH-87071ONF), and Mableton Communications, Limited (File No. BPH-870710NQ) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

MM Docket No. 88-400

File No. BPH-870707MJ
GONZALES BROADCASTING, INC.

File No. BPH-870710MD
BOLTON BROADCASTING, LIMITED

File No. BPH-870710MF
VOTH BROADCASTING COMPANY

File No. BPH-870710MY
METROPOLITAN MANAGEMENT CORPORATION

File No. BPH-870710MZ
LORENZO JELKS

File No. BPH-870710NF
QRW PARTNERS LIMITED PARTNERSHIP

File No. BPH-870710NQ
MABLETON COMMUNICATIONS, LIMITED

For a Construction Permit for a New FM Station
on Channel 273A (102.5 MHz),
Mableton, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: August 7, 1997 Released: August 12, 1997

By the Commission:

I. INTRODUCTION

1. This memorandum opinion and order grants a Joint Petition for Reconsideration, filed April 14, 1997, by Gonzales Broadcasting, Inc. (Gonzales), Bolton Broadcasting, Limited (Bolton), Voth Broadcasting Company (Voth), Metropolitan Management Corporation (MMC), QRW Partners Limited Partnership (QRW), and Mableton Communications Limited (MCL). These parties seek reconsideration of an order that declined to approve a settlement proposal on the grounds that it violated the provisions of 47 C.F.R. § 73.3525(a)(3), which limits the reimbursement of applications in a settlement agreement to their legitimate and prudent expenses. *Gonzales Broadcasting, Inc.*, 12 FCC Rcd 4662 (OGC 1997) (OGC Order). Consistent with the recently enacted Balanced Budget Act of 1997, that limitation will be waived. As a related matter, this memorandum opinion and order denies an application for review by Lorenzo Jelks (Jelks) upon which the settlement is contingent.

II. BACKGROUND

2. The parties listed above are the remaining competitors in this comparative proceeding for a new FM radio station in Mableton, Georgia. The Review Board granted Gonzales' application and denied those of Jelks and the other applicants. *Mableton Broadcasting Company, Inc.*, 8 FCC Rcd 7609 (Rev. Bd. 1993); *Mableton Broadcasting Company, Inc.*, 5 FCC Rcd 6314 (Rev. Bd. 1990). *See also Mableton Broadcasting Company, Inc.*, 7 FCC Rcd 4431 (ALJ 1992); *Mableton Broadcasting Company, Inc.*, 5 FCC Rcd 2473 (ALJ 1990). The Board affirmed the Administrative Law Judge's dismissal of Voth's application for failure to prosecute. It found that MMC, QRW, MCL, and Jelks were not financially qualified. As between the two remaining qualified applicants, Gonzales and Bolton, the Board found that

Gonzales was entitled to credit for 100 percent integration of ownership into management and that Bolton was entitled to no integration credit. The parties' applications for review, filed November 22, 1993, and oppositions, filed December 7, 1993, are pending before the Commission.

3. On February 25, 1994, this case became subject to the freeze on comparative proceedings resulting from the action of the United States Court of Appeals for the District of Columbia Circuit in *Bechtel v. FCC,* 10 F.3d 875 (D.C. Cir. 1993), which held that the integration criterion was arbitrary and capricious and therefore unlawful. *See Public Notice,* 9 FCC Rcd 1055 (1994). The Commission modified its freeze policy to provide that if the parties to a proceeding reached a settlement that was contingent upon the resolution of specific basic qualifying issues, such issues would be adjudicated, and the settlement ruled on *Public Notice*, 9 FCC Rcd 6689 (1994).

4. Such a settlement, involving all of the parties except for Jelks, has now been proposed to resolve this case. The settlement is contingent on the disqualification of Jelks. The proposed settlement contemplates a hybrid arrangement calling for both the reimbursement of parties for dismissing their applications and also the formation of a new entity through merger. Under the terms of the settlement, Gonzales' application would be granted and the other applications would be dismissed. Gonzales and the dismissing applicants would receive reimbursement of their expenses. Following approval of the settlement, Gonzales would assign the construction permit to a new entity, called New Radio Broadcasters of Georgia, Inc. (New Radio). Gonzales and the other applicants would own New Radio's stock.

5. A nonparty called Mableton Investment Group (MIG) would also be involved in the settlement. MIG would loan New Radio funds, would receive the right to program the new station under a local management agreement, and would

receive options to purchase the other parties' interests in the station. If MIG does not execute its options, the applicants could require MIG to purchase their interests.

6. The Mass Media Bureau supported approval of the agreement with certain conditions. The Bureau agreed with the parties that the settlement comports with the Commission's rules and that it does not violate the limits on reimbursement contained in the rules because 47 C.F.R. § 73.3525(a)(3) exempts bona fide mergers from the general limit on reimbursement. The Bureau, however, objected to two aspects of the settlement, as discussed below.

III. MERGER ISSUE

7. *OGC Order.* The OGC order declined to approve the agreement, finding that the evidence did not support a finding that the proposed merger is bona fide and therefore exempt from the limits on reimbursement set forth in 47 C.F.R. § 73.3525(a)(3). The order found that provisions of the proposed merger involving options raised substantial questions as to whether the settlement in effect provided for a deferred cash payment in excess of the limits on reimbursement, as opposed to being a bona fide merger.

8. *Pleadings.* In their petition, the parties argue that the OGC Order misapplied Commission policy. They contend that the proposed merger does not violate Commission policy because, whereas the policy was intended to deter the filing of abusive, speculative applications, they have vigorously prosecuted their applications for more than 10 years. In the absence of abuse, they assert that the overriding public interest lies in reducing litigation and expediting service to the public by approving the settlement. The parties also dispute the OGC Order's interpretation of the specific matters that led to disapproval of the settlement.

9. The Mass Media Bureau supports reconsideration. The Bureau acknowledges that petitioners have not clearly shown

any error or omission in the OGC Order. Mass Media Bureau's Comments on Joint Petition for Reconsideration, filed April 29, 1997 at 5. However, the Bureau submits that approval of the settlement would serve the public interest. The Bureau does not believe that the terms of the merger are impermissible. Moreover, the Bureau asserts that the applicants have prosecuted their applications in good faith for many years, indicating that applications were not abusive and that this proceeding may not be resolved in the foreseeable future absent a settlement.

10. *Discussion.* We find it unnecessary to reach the question of whether the proposed merger effectively provides for reimbursement in excess of the limitation imposed by 47 C.F.R. § 73.3525(a)(3). Section 3002(a)(3) of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997), added Section 309(1) to the Communications Act of 1934. Section 309(1) provides that, for a 180-day period, the Commission "shall waive any provisions of its regulations necessary" to permit persons, who, before July 1, 1997, filed competing applications for construction permits for new commercial radio or television stations, to enter an agreement to procure the removal of a conflict between their applications. In accordance with this mandate, we will waive the applicable limitation in this case. We will also waive the limit on reimbursement in other cases coming within the provisions of the statute. In addition to waiving regulations as required by the statute, we will look favorably on requests to waive certain other policies for cases designated for hearing where this would serve to facilitate settlement. For example, we would waive our policy that prevailing applicants in such settlements must adhere to divestiture proposals that had been submitted for consideration as part of the comparative process.[1]

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[1] Thus the petition by Gene A. Bechtel for Partial Reconsideration, filed May 28, 1996, seeking reconsideration of *Settlements in Comparative Broadcast hearings,* 11 FCC Rcd 4748 (1997), is dismissed as moot.

IV. ADDITIONAL SETTLEMENT ISSUES

11. Because the waiver of the limits on reimbursement moots the basis upon which the OGC Order rejected the settlement, we now address the issues that the Order did not reach. As noted above, the Bureau raises two objections to the settlement. First, the Bureau argues that QRW and MMC, which were found by the ALJ to have committed misrepresentations and abuse of process, should not be permitted to acquire a stock interest in the new licensee. The Bureau, relying on the Board's decision in *Marr Broadcasting Co. Inc.*, 2 FCC Rcd 6596 (Rev. Bd. 1987), asserts that, although the interests of QRW and MMC would not be cognizable under the Commission's ownership attribution rules, the character qualifications of these two entities are nevertheless relevant because the Board found that "the Commission's 'non-cognizable' interests policy did not extend to situations involving broadcast-related character qualifications." Mass Media Bureau's Comments on Supplements to Joint Request for Approval of Settlement Agreement, filed November 19, 1996 at 2, *quoting Marr*, 2 FCC Rcd at 6598 ¶ 11. Second, the Bureau asserts that the Commission should not vacate the decisions below, as this is no longer routine judicial practice.

12. Contrary to the Bureau's view, we find no obstacle to the fact that QRW and MMC (which will not be actively involved in the station's affairs) will each acquire a 9.8 percent stock interest in New Radio. (The parties' stock interests are described at FCC 97I-11 at ¶ 5.) These minority interests are not be cognizable under the Commission's ownership attribution rules, because Gonzales would have a 51 percent interest in New Radio and would therefore be a single majority stockholder. *See* 47 C.F.R. § 73.3555 Note 2(b).

13. We decline to follow the Review Board's suggestion in *Marr* that "the Commission has not extended t[he] policy

of 'non-cognizable interests' to situations involving broadcast-related character qualifications." *Marr*, 2 FCC Rcd at 6598 ¶ 11. As we made clear in *RKO General, Inc. (KHJ-TV)*, 3 FCC Rcd 5057, 5066 n.19 (1988): "the character qualifications of owners whose interests are not attributable under the multiple ownership rules and who do not participate in station management are not considered." This result follows from the principle that the Commission's attribution rules define those interests having "that degree of influence or control over the licensee and its facilities as should subject it to limitation . . . ." *Attribution of Ownership Interests*, 97 FCC 2d 997, 999 ¶ 2 (1984). Thus, in the absence of active participation in station affairs, the holders of non-cognizable interests are deemed inconsequential.

14. As an additional matter, we will vacate those findings and conclusions in the decisions below dealing with the dismissing applicants, as they request. Although we no longer routinely vacate decisions in connection with settlements (*see U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 115 S.Ct. 386, 391-92 (1994)), we have previously indicated that in the special circumstances surrounding settlements of cases subject to the *Bechtel* freeze, we would make an exception and vacate the findings below. *See Crystal Communications, Inc.*, 12 FCC Rcd 2149 (1997).

15. We now turn to the arguments by Jelks regarding Gonzales' qualifications. The issue raised regarding Gonzales concerns the bona fides of its ownership structure. Gonzales is a corporation of which Susan Polk is the 51 percent shareholder and president, and her husband, Lawrence Polk, is the 49 percent owner and vice president. 5 FCC Rcd at 2484 ¶ 95. Both Polks propose full-time integration into management. The ALJ denied Gonzales integration credit because he found that Gonzales' ownership structure was a "sham," that Mr. Polk actually controlled the

applicant, and that Mrs. Polk could not be relied on to exercise control or effectuate her integration proposal. *Id.* at 2485 ¶ 116. The Board reversed the ALJ and awarded Gonzales 100 percent integration credit. Although the Board found evidence that Mr. Polk, rather than Mrs. Polk, would exercise control, the Board found it clear that the two would operate the station together and were thus entitled to full credit. 8 FCC Rcd at 7611-12 ¶ 8.

16. Jelks contends that Gonzales should be disqualified or at least denied integration credit. Lorenzo Jelks Application for Review of Review Board Decision, filed November 22, 1993, at 2,3. Jelks relies on findings by the ALJ that Mrs. Polk's testimony was unreliable. For example, the ALJ found that Mrs. Polk's supposedly controlling interest in Gonzales was inconsistent with the Polks' usual practice of having major assets owned in Mr. Polk's name alone. *See* 5 FCC Rcd at 2484 ¶¶ 100-04. He also found that although Mrs. Polk claimed Hispanic status for purposes of the Gonzales application, she did not usually do so otherwise. *Id.* at 2492 ¶¶ 214-19.

17. We find that this matter is moot. In view of the settlement and Jelks' disqualification, it is irrelevant whether Gonzales is entitled to comparative integration credit, even assuming that such a criterion survives the *Bechtel* decision. Moreover, there is no question as to Gonzales' basic qualifications on this record. Despite his negative findings concerning Mrs. Polk's testimony and the reliability of the Gonzales proposal, the ALJ did not find a basis for adding an abuse of process or misrepresentation/lack of candor issue against Gonzales. *See Evansville Skywave, Inc.* 7 FCC Rcd 1699, 1700 ¶¶ 15-16 (1992) (a finding that a "sham" proposal is unreliable does not necessarily raise an issue of basic qualifications). He specifically indicated that he was not finding that Mrs. Polk deliberately lied in her testimony, and he found Gonzales basically qualified. 5 FCC Rcd at

2497 ¶ 24, 2499 n.30. Jelks' gives us no reason to go beyond the ALJ's findings except to allege in a conclusory manner that the discrepancies in Mrs. Polk's testimony were more serious than those found disqualifying in *Richardson Broadcast Group*, 7 FCC Rcd 1583 (1992). The disqualification in *Richardson*, however, resulted from a finding that the applicant's testimony was deliberately false and evasive. *See Richardson*, 7 FCC Rcd at 1585 ¶ 9. As noted above, the ALJ in this case expressly declined to make such a finding with respect to Mrs. Polk and we credit his ruling in this regard.

18. In view of the foregoing, we find that the parties' Joint Request complies in all respects with the provisions of 47 U.S.C. § 311(c) and the pertinent requirements of 47 C.F.R. § 73.3525(a). The applicants have provided sworn statements that there is no other consideration for the dismissal of their applications, that their applications were not filed for the purpose of reaching or carrying out a settlement agreement, and that approval of the agreement will serve the public interest by facilitating the institution of new FM service to Mableton, Georgia, and by terminating this litigation.

V. JELKS' QUALIFICATIONS

19. Because we find that the settlement otherwise comports with the public interest, we turn to Jelks' qualifications, upon which the settlement is contingent. The Board found that Jelks was financially unqualified. *See* 8 FCC Rcd at 7615-16 ¶¶ 20-21. In his application, Jelks certified that he lacked sufficient funds to construct and operate the proposed station. *Id.* at 7615 ¶ 20. He indicated that he would file a financial amendment relating to his financial qualifications "in the near future." *Id.* Nevertheless, for unknown reasons, the Hearing Designation Order in this proceeding did not specify a financial issue

against Jelks. *Id.* at 7615-16 ¶¶ 20-21. Jelks did not seek to amend his application to indicate that he had sufficient funds as he represented he would. *Id.* at 7615 ¶ 20. Ultimately, the ALJ granted a motion by Jelks' opponents and added a financial issue against Jelks. *Id.* at 7615-16 ¶¶ 20-21. Jelks, however, still did not amend his financial proposal. *Id.* at 7615 ¶ 20.

20. Jelks attempted to submit evidence that he had obtained a financial commitment from a bank during the exchange of hearing exhibits. 8 FCC Rcd at 7616 ¶ 21. The ALJ rejected the evidence on the grounds that Jelks had not shown good cause to amend his application and disqualified Jelks for lack of financial qualifications. *Id.* The Board, finding that Jelks had shown no justification for his lateness in obtaining a bank letter, affirmed Jelks' disqualification.

21. In his application for review, Jelks argues that he was not on notice that it was necessary for him to amend his application in order for him to demonstrate his financial qualifications at hearing. He claims that the Commission's policy has been routinely to permit applicants to introduce financial evidence at hearing without amending their applications. He contends that this policy was not changed until the decision in *Edwin A. Berstein*, 4 FCC Rcd 8420 (Rev. Bd. 1989), *rev. denied*, 5 FCC Rcd 2843 (1990), *aff'd. sub. nom. Lefebvre v. FCC*, 926 F.2d 1215 (D.C. Cir. 1991), which was released after the ALJ's ruling in this proceeding. Jelks asserts that his financial exhibits should now be accepted and that he should now be found financially qualified. He also asserts that his application about filing an amendment in the near future was not a misrepresentation.

22. We reject Jelks' contention that he lacked notice. We find no support for Jelks' assertion that Commission policy permitted an applicant to make a showing at hearing that directly contradicted a representation in the application,

without showing good cause for amendment of the application. The principal is long-established that an applicant's evidence at hearing must conform to the proposal contained in the application. As the Review Board stated in *Neil N. Levitt*, 33 FCC 720, 722 ¶ 8 (Rev. Bd. 1962), cited by Jelks:

> All parties to a hearing have the right to prepare their cases on the basis of the proposals contained in an application. [Footnote omitted.] This right is adversely affected when applicants in hearing project proposals not of record.

23. It may be true, as Jelks claims, that in *Levitt* and some other past cases the Commission has not always been strict in requiring applicants to file amendments to support their showing at hearing. The Commission's current policy, however, in effect at the time Jelks filed its application, is strict adherence to the requirement that applicants must demonstrate good cause to amend their proposals, where doing so is necessary to establish their qualifications. The Commission stated in *Chudy Broadcasting Corp.*, 58 RR 2d 133, 134-35 n. 7 (1985):

> We have recently undertaken to place greater emphasis on providing service to the public in the most efficient, expeditious manner possible. Temporizing with flawed proposals has in the past disserved the public interest by inordinately delaying the initiation of new service.

24. Accordingly, *Edwin A. Berstein*, 4 FCC Rcd at 8421-22 ¶¶ 6-7, accurately reflects pre-existing Commission policy in holding that an applicant negatively certifying its financial qualifications must amend its application and show good cause to substitute the representation that it is qualified. *See also Radio Associates, Inc.*, 6 FCC Rcd 2094, 2095 ¶¶ 7-8 (Rev. Bd. 1991) (if an applicant knows its proposal is defective, it cannot expect to sit back and correct

the defect at its leisure or convenience). Jelks acknowledged as much when he represented that he would amend his application "in the near future." His failure to do so in a timely fashion is fatal to his proposal.

VI. ORDERING CLAUSES

25. ACCORDINGLY, IT IS ORDERED, That the Joint Petition for Reconsideration, filed April 14, 1997, by Gonzales Broadcasting, Inc., Bolton Broadcasting Limited, Voth Broadcasting Company, Metropolitan Management Corporation, QRW Partners Limited Partnership, and Mableton Communications, Limited IS GRANTED.

26. IT IS FURTHER ORDERED, That (1) the Joint request for Approval of Settlement Agreement, filed August 28, 1996, by Gonzales Broadcasting, Inc., Bolton Broadcasting Limited, Voth Broadcasting Company, and Mableton Communications, Limited. (2) the Supplement to Joint Request for Approval of Settlement Agreement, filed October 10, 1996, by Gonzales Broadcasting, Inc. and Metropolitan Management Corporation, and (3) the Second Supplement to Joint Request for approval of Settlement Agreement, filed November 6, 1996, by Gonzales Broadcasting, Inc. and QRW Partners Limited Partnership ARE GRANTED and the associated settlement agreement IS APPROVED.

27. IT IS FURTHER ORDERED, That Lorenzo Jelks' Application for Review of Review Board Decision, filed November 22, 1993, IS DENIED, and that the Application for Review of the Review Board's Decision #FCC 93R-53, filed November 22, 1993, by QRW Limited Partnership, the Application for Review of Metropolitan Management Corporation, filed November 22, 1993, the Application for Review of Mableton Communications, Ltd., filed November 22, 1993, the Application for Review, filed November 22, 1993, by Bolton Broadcasting Ltd., the Application for

Review, filed November 22, 1993, by Voth Broadcasting Company, and the Contingent Application for Review, filed November 22, 1993, by Gonzales broadcasting, Inc. ARE DISMISSED as moot.

28. IT IS FURTHER ORDERED, That the decisions of the ALJ and the Review Board: *Mableton Broadcasting Company, Inc.*, 8 FCC Rcd 7609 (Rev. Bd. 1993), *Mableton Broadcasting Company, Inc.*, 5 FCC Rcd 6314 (Rev. Bd. 1990); *Mableton Broadcasting Company, Inc.*, 7 FCC Rcd 4431 (ALJ 1992); *Mableton Broadcasting Company, Inc.*, 5 FCC Rcd 2473 (ALJ 1990) ARE VACATED with respect to the findings and conclusions regarding Gonzales Broadcasting, Inc., Bolton Broadcasting Limited, Voth Broadcasting Company, Metropolitan Management Corporation, QRW Partners Limited Partnership, and Mableton Communications, Limited, but not with respect to the findings and conclusions regarding Lorenzo Jelks.

29. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

30. IT IS FURTHER ORDERED, the Petition of Gene A. Bechtel for Partial Reconsideration, filed May 28, 1996, IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

RELEVANT STATUTES AND REGULATIONS

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

47 U.S.C. § 308. Requirements for license

(a) Writing; exceptions

The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it: *Provided,* That (1) in cases of emergency found by the Commission involving danger to life or property or due to damage to equipment, or (2) during a national emergency proclaimed by the President or declared by the Congress and during the continuance of any war in which the United States is engaged and when such action is necessary for the national defense or security or otherwise in furtherance of the war effort, or (3) in cases of emergency where the Commission finds, in the nonbroadcast services, that it would not be feasible to secure renewal applications from existing licensees or otherwise to follow normal licensing procedure, the Commission may grant construction permits and station licenses, or modifications or renewals thereof, during the emergency so found by the Commission or during the continuance of any such national emergency or war, in such manner and upon such terms and conditions as the Commission shall by regulation prescribe, and without the filing of a formal application, but no authorization so granted shall continue in effect beyond the period of the emergency or war requiring it; *Provided further,* That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) Conditions

All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, charac-

ter, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from the applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee.

(c) Commercial communication

The Commission in granting any license for a station intended or used for commercial communication between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 35 of this title.

47 U.S.C. § 309. Application for license

(a) Considerations in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * * * * * * * *

(e) Hearings; intervention; evidence; burden of proof

If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in

interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

* * * * * * * * *

(*l*) Applicability of competitive bidding to pending comparative licensing cases

With respect to competing applications for initial licenses or construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997, the Commission shall—

(1) have authority to conduct a competitive bidding proceeding pursuant to subjection (j) to assign such license or permit;

(2) treat the persons filing such applications as the only persons eligible to be qualified bidders for purposes of such proceeding; and

(3) waive any provisions of its regulations necessary to permit such persons to enter an agreement to procure the removal of a conflict between their applications during the 180–day period beginning on the date of enactment of the Balanced Budget Act of 1997.

47 U.S.C.§ 319. Construction permits.

(a) No license shall be issued under the authority of this Act for the operation of any station unless a permit for its construction has been granted by the Commission. The application for a construction permit shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant in any manner or form, including by electronic means, as the Commission may prescribe by regulation.

* * * * * * *

47 U.S.C. § 402. Judicial review of Commission's orders and decisions

* * * * * * * * *

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1) to (4) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

(c) Filing notice of appeal; contents; jurisdiction; temporary orders

Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

(d) Notice to interested parties; filing of record

Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28.

(e) Intervention

Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

(f) Records and briefs

The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

(g) Time of hearing; procedure

The court shall hear and determine the appeal upon the record before it in the manner prescribed by section 706 of Title 5.

(h) Remand

In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(i) Judgment for costs

The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

(j) Finality of decision; review by Supreme Court

The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

47 C.F.R. § 73.3522 Amendment of applications.

(a) *Predesignation amendment.* (1) Subject to the provisions of §§ 73.3525, 73.3571, 73.3572, 73.3573, and 73.3580, and except as provided in paragraph (a)(2) of this section, any application, other than an application for a low power TV, TV translator, TV booster or a nonreserved band FM station may be amended as a matter of right prior to the adoption date of an order designating such applications for hearings, merely by filing the appropriate number of copies of the amendments in question duly executed in accordance with § 73.3513. If a petition to deny (or to designate for hearing) has been filed, the amendment shall be served on the petitioner.

(2) Subject to the provisions of §§ 73.3525, 73.3571, 73.3572, 73.3573 and 73.3580, and except for applications for low power TV, TV translator, TV booster or nonreserved band FM stations, mutually exclusive broadcast applications may be amended as a matter of right by the date specified (not less than 30 days after issuance) in the FCC's Public Notice announcing the acceptance for filing of the last-filed mutually exclusive application. Subsequent amendments prior to designation of the proceeding for hearing will be considered only upon a showing of good cause for late filing or pursuant to § 1.65 or § 73.3514. Unauthorized or untimely amendments are subject to return by the FCC's staff without consideration.

(3) Subject to the provisions of §§ 73.3525, 73.3572 and 73.3580, any application for the lower power TV, TV translator or TV booster station may be amended as a matter of right during the application window filing period pursuant to § 73.3564(d). If it is determined that a lower power TV, TV translator or TV booster application is substantially complete but contains some defect(s) or omission(s), a

deficiency letter will be issued affording the applicant 30 days to correct the defect.

(4) No applicant for a low power TV, TV translator or TV booster station which is mutually exclusive can improve its status with respect to § 1.1622 by amendment of its application subsequent to the release of the initial Public Notice announcing the public lottery that will resolve the applicant's mutual exclusivity pursuant to § 1.1601 *et seq.*, not withstanding the requirements of § 1.65.

(5) Paragraphs (b) and (c) of this section are not applicable to applications for low power TV, TV translator, or TV booster stations.

(6) Subject to the provisions of § 73.3525, 73.3573, and 73.3580, applications for non-reserved band FM stations (other than Class D stations) may be amended as a matter of right during the appropriate window filing period pursuant to § 73.3564(d). For a period of 30 days following the FCC's issuance of a Public Notice announcing the tender of the application, minor amendments may be filed as a matter of right. For applications received on or after August 7, 1992, an applicant whose application is found to meet minimum filing requirements but nevertheless is not complete and acceptable shall have the opportunity in the 30-day period specified in the FCC staff's deficiency letter to correct all deficiencies in the tenderability and acceptability of the underlying application, including any deficiency not specifically identified by the staff. [For minimum filing requirements see § 73.3564(a). Examples of tender defects appear at 50 FR 19936 at 19945–46 (May 13, 1985), *reprinted as* Appendix D, *Report and Order*, MM Docket No. Docket No. 91–347, 7 FCC Rcd 5074, 5083–88 (1992). For examples of acceptance defects see 49 FR 47331.] Prior to the end of the period specified in the deficiency letter, a submission seeking to correct a tender and/or acceptance defect in

an application meeting minimum filing requirements will be treated as an amendment for good cause if it would successfully and directly correct the defect. Other amendments prior to designation for hearing or grant will be considered only upon a showing of good cause for late filing or pursuant to § 1.65 or § 73.3514. Unauthorized or untimely amendments are subject to return by the Commission without consideration. However, an amendment to a non-reserved band application will not be accepted after the close of the appropriate filing window if the effect of such amendment is to alter the proposed facility's coverage area so as to produce a conflict with an applicant who files subsequent to the initial applicant but prior to the amendment application. Similarly, an applicant subject to "first come/first serve" processing will not be permitted to amend its application and retain filing priority if the result of such amendment is to alter the facility's coverage area so as to produce a conflict with an applicant who files subsequent to the initial applicant but prior to the amendment.

(b) *Postdesignation amendment.* (1) Except as provided in paragraph (b)(2) of this section, requests to amend an application after it has been designated for hearing will be considered only upon written petition properly served upon the parties of record in accordance with § 1.47 and, where applicable, compliance with the provisions of § 73.3525, and will be considered only upon a showing of good cause for late filing. In the case of requests to amend the engineering proposal (other than to make changes with respect to the type of equipment specified), good cause will be considered to have been shown only if, in addition to the usual good cause consideration, it is demonstrated:

(i) That the amendment is necessitated by events which the applicant could not reasonably have foreseen (e.g., notification of a new foreign station or loss of transmitter site by condemnation); and

(ii) That the amendment does not require an enlargement of issues or the addition of new parties to the proceeding.

(2) In comparative broadcast cases (including comparative renewal proceedings), amendments relating to issues first raised in the designation order may be filed as a matter of right within 30 days after that Order or a summary thereof is published in the FEDERAL REGISTER, or by a date certain to be specified in the Order.

(c) Notwithstanding the provisions of paragraph (b) of this section, and subject to compliance with the provisions of § 73.3525, a petition for leave to amend may be granted, provided it is requested that the application as amended be removed from the hearing docket and returned to the processing line. See § 73.3571.

NOTE 1. When two or more broadcast applications are tendered for filing which are mutually exclusive with each other but not in conflict with any previously filed applications which have been accepted for filing, the FCC, where appropriate, will announce acceptance of the earliest tendered application and place the later filed application or applications on a subsequent public notice of acceptance for filing in order to establish a deadline for the filing of amendments as a matter of right for all applicants in the group.

APPLICATION FOR CONSTRUCTION PERMIT FOR
COMMERCIAL BROADCAST STATION
(carefully read instructions before filing form)
Return only form to FCC

For Commission Use Only
File No: BPH-870710MZ

Section I — GENERAL INFORMATION

1. Name of Applicant Lorenzo Jelks
   Street Address or P.O. Box Post Office Box 3191
   City Atlanta
   State GA
   Zip Code 30302
   Telephone Number (Include Area Code) (404) 577-4027

Send notices and communications to the following named person at the address below:

Name Lorenzo Jelks
Street Address or P.O. Box Post Office Box 3191
City Atlanta
State GA
Zip Code 30302
Telephone Number (Include Area Code) (404) 577-4027

2. This application is for: □AM □FM □TV

   (a) Channel No. or Frequency: 273A
   (b) Principal Community: City Mableton
   State GA

   (c) Check one of the following boxes:
   ☒ Application for NEW station
   □ MAJOR change in licensed facilities; call sign;
   □ MINOR change in licensed facilities; call sign;

- ☐ MAJOR modification of construction permit; call sign
  File No. of Construction permit:
- ☐ MINOR modification of construction permit; call sign
  File No. of Construction permit:
- ☐ AMENDMENT to pending application;
  Application file number: PUBLIC RECORD

NOTE: It is not necessary to use this form to amend a previously filed application. Should you do so, however, please submit only Section 1 and those other portions of the form that contain the amended information.

3. Is this application mutually exclusive with a renewal application? ☐ Yes ☒ No

   If yes state: Call letters:
   Community of License:
   City State

* * * *

Section III FINANCIAL QUALIFICATIONS

NOTE: If this application is for a change in an operating facility do not fill out this section.

This applicant certifies that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue.

☐ Yes ☒ No

Applicant will file an amendment relating to his financial qualifications in the near future.

Section IV PROGRAM SERVICE STATEMENT

Attach an Exhibit, a brief description, in narrative form, of the planned programming services relating to the issues of public concern facing the proposed service area.

*The applicant's proposed programming plans call for extensive news and information programs relating to the Mableton area to be broadcast on a daily basis. Informational programs concerning governmental matters, schools, church activities and civic organizations will be included in our daily programming, and programming featuring the views of Mableton area communities leaders on a variety of topics will be broadcast weekly. The Commission's fairness doctrine will be followed.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MM Docket No. 88-400

In re Applications of

File No. BPH-870706ML *et al.*
MABLETON BROADCASTING COMPANY, INC. *et al.*

For a Construction Permit for a New FM Station
on Channel 273A (102.5 MHz)
Mableton, Georgia

To: The Review Board

LORENZO JELKS' CONSOLIDATED BRIEF AND EXCEPTIONS TO INITIAL DECISION OF ALJ WALTER C. MILLER

Lawrence J. Bernard, Jr.
Ward & Mendelsohn, P.C.
1100 17th Street, N.W.
Suite 900
Washington, .C. 20036

Counsel for Lorenzo Jelks

May 14, 1990

APPENDIX TO

LORENZO JELKS' CONSOLIDATED BRIEF AND EXCEPTIONS TO INITIAL DECISION OF ALJ WALTER C. MILLER

* * * * * * * * *

[585] MR. BERNARD: Your Honor, I would move the admission of Dawson Exhibits 1 through 5. If you would like to take them—

JUDGE CHACHKIN: Let's take them one at a time. First of all, Dawson Exhibit 1, any objections?

[586] MR. PRAK: Yes, sir, Your Honor.

JUDGE CHACHKIN: State is please.

MR. PRAK: With respect to Dawson Exhibit 1, Your Honor, Malloy would object to Exhibit 1 as being a variance from the application.

JUDGE CHACHKIN: How is it at variance to the application?

MR. PRAK: The application indicates that the applicant is not financially qualified.

JUDGE CHACHKIN: Yes, and an issue was added.

MR. PRAK: And no amendment has been filed to reflect the punitive acquisition of financial qualifications.

JUDGE CHACHKIN: Do you have any precedent in support of your proposition that an amendment is required?

MR. PRAK: I cannot cite Your Honor to case authority on this topic; however, I believe that under the current—Your Honor, adverted to the new processing standards that have been employed more recently and I believe that under the current processing standards, Mr. Dawson's application would presently be considered to suffer from a grantability defect.

JUDGE CHACHKIN: Why is that?

MR. PRAK: Because he does not possess the requisite legal qualifications to serve as a Commission licensee.

[587] JUDGE CHACHKIN: We are talking about financial qualifications, what does legal qualifications have to do with it?

MR. PRAK: Well, financial would be one of those—

JUDGE CHACHKIN: Where has the Commission ever held that financial qualifications is a basic defect which makes the application nongrantable, if they have, it's news to me.

MR. PRAK: Your Honor, if I could—

JUDGE CHACHKIN: In the first place, an issue was put in in this proceeding. If you are saying that the processing line erred in in putting in an issue, then you should have filed something asking that the Commission review the matter.

I am bound by the fact that an issue was added. An issue was added, the Commission did not dismiss the application, the Commission just added an issue. Since the staff added an issue obviously, the purpose of the issue is for me to try the issue and determine whether or not the applicant has satisfied the issue.

So I don't know where you are going, counsel.

MR. PRAK: Your Honor, it is my client's position that an amendment is in fact required and that in this situation one of the reasons employed by this particular—

JUDGE CHACHKIN: An amendment of what?

MR. PRAK: An amendment to change the application—

[588] JUDGE CHACHKIN: In order to change something there has to be something in the application itself. Is there

any information in the application itself relating to financial qualifications?

MR. PRAK: Yes, sir.

JUDGE CHACHKIN: What is that?

MR. PRAK: There is a page in the application which asks this question, whether you are certified—

JUDGE CHACHKIN: Which you make a certification. The applicant stated he cannot make this certification, therefore an issue was added, but is there anything in the application which requires that you put numbers down like it used to be in the old days?

MR. PRAK: Oh, no, Your Honor, I am not contending that.

JUDGE CHACHKIN: What is he supposed to amend, to do what then?

MR. PRAK: To indicate that at some point in December, 23 days prior to hearing, he acquired—he became certifiable, certify as to his financial qualifications.

JUDGE CHACHKIN: This is in effect his statement of certification, the fact that he is now meeting the issue.

MR. PRAK: We would contend otherwise, Your Honor, and with respect to authority that I could cite you to perhaps more fully and fairly understand the argument I am [598] seeking to make to you, I would cite this case to you, the recent decision of the United States Court of Appeals for the District of Columbia Circuit entitled Royce International Broadcasting Company vs. FCC. I believe it's reported at 63 RR 2d., the particular pages of interest that might be pertinent for Your Honor's consideration would be pages 658 and I am citing here to RR 2d—

JUDGE CHACHKIN: Did that involve financial qualifications, counsel?

MR. PRAK: No, sir, Your Honor, but it concerned the question—

JUDGE CHACHKIN: Did it involve financial qualifications—it involved site availability, did it not?

MR. PRAK: Yes, sir—

JUDGE CHACHKIN: That's a whole different ball game. The Commission on site availability said that if you don't have a site initially therefore that's a fundamental matter at least insofar as situations involving FM stations. They have not come out with the same policy in TV cases but they have in FM cases.

They have stated that if you don't have a site availability, therefore you have a fundamental defect since without that you can't show where your facilities are going to be located, et cetera, et cetera, et cetera.

What does that have to do with this financial [590] qualifications where not only you have the Commission, not in television cases, but likewise in FM cases, they have not ever said that this is a grantability factor. So citing me Royce which I am fully familiar with doesn't assist you one bit.

MR. SMITHWICK: Your Honor, if I could be heard—

JUDGE CHACHKIN: Show me where in a financial case where the Commission ever said that's a grantability factor, the fact that you are not financially qualified at the time you file the application. I understand the Commission should do that, but the fact of the matter, they haven't done that.

MR. PRAK: It may be, Your Honor, as you believe, it may be a matter of first impression, what I was trying to

communicate in citing the Royce case to you is our theory of the case with respect to making this objection.

Our theory, Your Honor, would be that the making—the acquisition of financial qualifications by this applicant in this case after discovery and on the eve of hearing, albeit within, I mean, albeit, 23 days before the onset of the hearing, it is our contention that that is a poor qualification which this applicant could not show good cause and meet the standard set forth in the long line of precedents beginning with Irwin O'Connor Broadcasting, which interestingly enough I went back to read in preparation for [591] making this objection, and I was interested to be reminded zhat Irwin O'Connor itself was a financial qualifications case involving—

JUDGE CHACHKIN: In Irwin O'Connor, wasn't there a need to file financial information with the Commission—he therefore had to amend, did he not?

MR. PRAK: To that extent—

JUDGE CHACHKIN: Therefore you had to show good cause because you had to amend. The Commission had done away with the requirement of submitting financial information, therefore there is nothing to amend.

MR. PRAK: To that extent, Your Honor, certainly that is true, but it would be our contention that on these facts in this case, and again, certainly conceding the point as Your Honor has said, it may well be an issue of first impression—we would contend that where we were without the opportunity in discovery to pursue this issue, as we were unable to do it at Mr. Dawson's deposition but we did question him concerning the financial albeit with some documents redacted and some other things, we were able to question him on that.

We, of course, were not permitted to test the bonafides of the proposal which they had put before Your Honor today

because it wasn't extant at that time, it didn't exist. I mean, we would—did not have an opportunity for [592] discovery on those issues and if we had wanted to, for example, rather than having to notice these individuals for cross-examination at hearing, if we had wanted to take their deposition at that time following Mr. Dawson's deposition we could not have done so—

JUDGE CHACHKIN: I wouldn't have permitted it.

MR. PRAK: That may well be true as well, but—

JUDGE CHACHKIN: I appreciate your position, counsel, but I don't understand why you are making the argument to me. I have made clear that as far as I am concerned the issue was added and they have a right to meet the issue.

Now in discovery, I don't know what questions you asked at the deposition, whether you attempted to elicit anything concerning his financial costs, was that even attempted? I don't know.

MR. PRAK: Yes, Your Honor, I believe the matter was discussed and indeed, another matter which was discussed in the depositions was the question, were questions designed to address the question of this applican't diligence in proceeding with an effort to pursue financial qualifications.

Your Honor, in this case, the applications as you well know were filed pursuant to the Commission's window or the cutoff date for the filing of applications. The applications were filed in July of 1986.

At that time this applicant checked no, he was not [593] financially qualified. That was certainly his perogative. The evidence developed at deposition and which we will hope to adduce today will demonstrate that there periods of time of great length, of great length at which the kind of continuing due diligence that one would expect to be able to rise to the

level sufficient to meet the Irwin O'Connor test, simply did not occur and with all due respect to opposing counsel, we believe that it may well be that they would have preferred that we not have an opportunity to engage in that kind of full blown discovery and that the acquisition of these qualifications which Your Honor has before you today post, and on the eve of hearing too—with some prejudice too—

JUDGE CHACHKIN: First of all, insofar as you are talking about the break gap between 1986 and the time of designation, I would suggest that if you felt that that was, that the Commission and the staff had erred in adding issue rather than in dismissing the applicant, you should have a filed a request to certify the matter to the Commission which you did not do.

The fact of the matter is, I have the issue and as far as I know, when an issue is added, the party has the right to put in evidence to meet the issue and so you are a little late if you are arguing that the Commission should have dismissed the application because of the gap.

[594] MR. PRAK: Well, I certainly understand what Your Honor is saying. Our argument is only that this exhibit should not be accepted because it is presently at variance with the application—

JUDGE CHACHKIN: It is not at variance with the application since there is nothing in the application relating to his finances, so how could it be at variance.

MR. SMITHWICK: Your Honor, the hearing designation order includes a clause, paragraph 10, it says "The applicants above," referring to BCB, a now dismissed application in Dawson, "have given negative responses to Section 3, items one and two, FCC Form 301."

JUDGE CHACHKIN: That's right—

MR. SMITHWICK: So the form—

JUDGE CHACHKIN: So you are saying if he then comes in to meet his financial qualifications it's at variance with the application—that would make no sense at all.

MR. SMITHWICK: May I finish my thought?

JUDGE CHACHKIN: Yes.

MR. SMITHWICK: I am saying, Your Honor, that the FCC's rules and regulations provide a vehicle that when issues are first raised in a hearing designation order, that within 30 days of the publication of those issues in the hearing designation order, the applicant has a free bite at the apple to file an amendment addressing that issue.

[595] The issue was in this hearing designation order and if the applicant didn't want to take the opportunity back in the beginning, in 1986 to demonstrate his financial qualifications or on what we call the B cutoff date, the date for filing amendments, he had 30 days after the issues appeared in the hearing designation order to file an amendment which is what the rules, I believe, contemplate one must do and nothing happened.

Then 20 some says before the hearing we get a motion for summary decision, and all I am saying, Your Honor, is that I just want to preserve my objection for the record and that's it.

MR. PRAK: Your Honor, may I just say one other thing and then I will be quiet.

JUDGE CHACHKIN: Go ahead.

MR. PRAK: In picking up on Mr. Smithwick has ably articulated, here is the problem: the problem is precisely this, the application as it stands now says no, no amendments have been filed.

It would be our contention that whereas here, an applicant chooses to wait or for whatever reasons is unable to come up

with the ability to say yes and to amend his application, then he can't do so at such a time that it makes an end run around the good cause showing that must be required of any applicant seeking to amend his application.

[596] That of course is irrelevant if Your Honor's view of the matter is that no amendment is required. Our position is that one would be required and then we would then have a chance to cross-examine him with respect to the amendment and have the materials and the like.

But I certainly understand Your Honor's position, if we are not able to persuade you then I believe we have outlined our thinking.

JUDGE CHACHKIN: Mr. Bernard, do you have anything to say about this?

MR. BERNARD: Your Honor—

MR. WILHELM: Your Honor, Interactive has not been heard on this.

JUDGE CHACHKIN: Oh, you have something to add, go ahead.

MR. WILHELM: Yes, apologies to Mr. Dawson.

JUDGE CHACHKIN: All right, we might as well have all of the arguments and then Mr. Bernard can answer.

MR. WILHELM: With your indulgence, Your honor, because I have made these arguments in a motion. The motion is not part of the record and I will just do it briefly.

Mr. Dawson in his application specifically stated that he would be submitting an amendment, he used the word amendment. It wasn't a simple no answer.

So from the outset he recognized the need to [597] amend. He is charge as a matter of law, with knowledge of the Commission's rules respecting amendments, those

amendments provide for amendments as of right before the B cutoff date and amendments to meet qualifying issues as of right within 30 days of the designation order.

Your Honor's position seems to be that whenever a qualifying issues is added, that does away with any need to show due diligence or any need for a petition to submit a—a petition for leave to amend and we respectfully—

JUDGE CHACHKIN: That's not my position. I am saying where an amendment is required, with the site matter for instance, where someone wanted to amend to change the site where the Commission requires information on the site, then therefore, as I understand the law, you would have to amend, to change, an amendment means to change something in your application. Here since no financial information is called for, then there is no need to change anything.

MR. WILHELM: Your Honor, for purposes of my understanding, how would you regard an air space issue? I get an air space issue designated against me. I have checked the box that says, I don't have FAA approval. An issue gets designated against me, am I free to submit that at any time or must I exercise diligence in the presentation of that amendment? They seem identical on the facts here—

JUDGE CHACHKIN: My position as far as air space [598] is concerned, as long as you submit it, got approval from the FCC prior to the time I issued my initial decision, that would be all that was required.

MR. WILHELM: Would I have to amend—

JUDGE CHACHKIN: As long as you don't change your transmitter site and no, you would not have to file an amendment. There is no need to amend anything, all you have to do is get approval from the FAA and submit that

approval at the time prior to the time that I issue my initial decision. That has always been my position.

Some other judges take the position that you have to submit it prior to the close of the record, but I have never heard anyone saying that—require you have to file an amendment.

MR. WILHELM: Judge Kuhlmann, Your Honor, two weeks ago—I am not saying—

JUDGE CHACHKIN: Judge Kuhlmann is Judge Kuhlmann, and I not responsible for what he does. There is nothing that I know of that you would be amending unless you are changing your antenna site obviously—if you have to change an antenna site, then you have a different situation, but I don't know the basis of his filing an amendment. I have never required it and I have never been reversed on that point. Nobody has ever contended that there was a need for an amendment. So what another judge does is something I can't do [599] anything about.

MR. WILHELM: I really wasn't citing that—

JUDGE CHACHKIN: I know, but I have never done, I have never required an amendment. My understanding of an amendment is something that has changed in the application, then you have to file an amendment. If there is nothing in the application calling for particular information then there is nothing to amend.

For instance, an auxiliary generator, since there is nothing in the application which refers to a requirement for a auxiliary generator, then obviously you don't have to amend anything in your application when you seek a auxiliary generator, when you request an auxiliary generator.

MR. SMITHWICK: Your Honor, I don't want this to be construed as being in agreement with Mr. Wilhelm's

comparison of the FAA matter with financial qualifications. My understanding is that there is nothing in the form with respect to the FAA matter, that's something between the applicant and the Federal Aviation Administration that is a prerequisite to building a tower.

The financial qualifications section of the form is quite different and there is a section, Section 3 and it says essentially are you financially qualified, yes or no and you state yes or no and I just do not agree with Mr. Wilhelm and I want that clear.

[600] JUDGE CHACHKIN: I understand, the only thing one could argue here is since you file a certification, therefore you have to file a new certification, but whether or not it was done or not it seems to me is irrelevant because it seems to me that this is—an actual showing certainly substitutes for a statement of certification and I think that's the appropriate procedure to follow when an issue is added.

Now another vehicle the parties could have followed, as far as I am concerned, the parties, if they felt, once the issue was added, the parties had a right to move for summary decision against the applicant on the grounds that they have failed to file any information demonstrating they were financially qualified.

The parties didn't utilize that device if they were concerned about time, they could have done that. Since they didn't do that, then it seems to me that Mr. Bernard is free at the time he exchanges his exhibits to submit the evidence to meet the issue as with any other issue.

Mr. Bernard, do you have anything you want—

MR. YELVERTON: Your Honor—

JUDGE CHACHKIN: Go ahead, Mr. Yelverton.

MR. YELVERTON: I would just state for the record that Free Air joins in these objections. I don't have anything [601] to add, but for the purposes of any appeal, I would join in the objections.

JUDGE CHACHKIN: Well, the only precedent that has been cited to me is Royce and as far as I am concerned, that doesn't apply to this case since that involved that a situation where there is a specific requirement that you put in the application information concerning your antenna and therefore since you do that you have to show good cause if you seek an amendment, and in my judgment, since there is no such requirement at least in the present applications, then there is obviously—Royce doesn't apply.

MR. SMITHWICK: Are we also considering Section 1.65 of the rules, Your Honor, which would require an amendment when a substantial change occurs, that's the section I was arguing under—

JUDGE CHACHKIN: 1.65 doesn't require an amendment. 1.65 requires a notification when there is a change, substantial change of some kind and then you have to file under 1.65, that's not an amendment. That is not an amendment which is seeking to show good cause under 1.522 or 733522, that's merely a requirement under 1.65 that you keep the parties informed within 30 days after a substantial change or significant change.

I have seen judges, I don't know on what basis deny deny a 1.65 request when all 1.65 request is a notification, [602] nothing more. You are not seeking any substantive change, you are just merely advising the parties, notifying the parties as to any substantial changes, and obviously O'Connor has nothing to do with the 1.65 change or information.

Mr. Bernard?

MR. BERNARD: Your Honor, I won't make any long statement. We briefed the subject in response to Mr. Wilhelm's motion and you ruled that the motion for summary decision was timely filed. We take the view that the question, does the applicant certify his financial qualifications and the answer is no, to be a requirement so the Commission can go ahead and process the application. We did that and specified an issue. It seems to me it would be a rather hollow requirement to go back and file—change a no answer to a yes answer.

The issue was added, we presented our proof and I believe your ruling on Mr. Wilhelm's motion to dismiss was correct.

JUDGE CHACHKIN: Any other objections?

MR. PRAK: To Exhibit 1?

JUDGE CHACHKIN: Pardon?

MR. PRAK: We are talking here about—

JUDGE CHACHKIN: We are still talking about Exhibit 1. I have overruled your general objection to the receipt of the exhibit.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

MM Docket No. 88-400

In the Matter of:
MABLETON, GEORGIA

VOLUME 12

The above-entitled matter came on for hearing pursuant to adjournment before Walter C. Miller, Administrative Law Judge, at 2000 L Street, N.W., Courtroom No. 3, Washington, D.C., on Tuesday, March 7, 1989, at 8:30 a.m.

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MR. EDMUNDSON: I'm sorry I made it.

JUDGE MILLER: I think whether this letter gives reasonable assurance or not is something that would have had to have been tested in full cross-examination because it has all the necessary ingredients; maybe not in the form that people would like. It has an interest rate. It has terms. At least it's always been my view it doesn't need to be a binding commitment; just reasonable assurance to the determining body that, if push comes to shove, he can go in there and get a loan on approximately those terms.

MR. EDMUNDSON: I agree with you 100 percent. Exhibit 5—it seems to me the substance of Exhibit 5, first paragraph is, the representation is that it is legally binding. When you use the word agree, that means—that's something legal to me. You're right. You've ruled.

JUDGE MILLER: It would have been tested. Maybe in the final analysis you could convince me or convince the appellate body that when they use the word agree in there, that he was saying something more than the letter represented it could do.

In any event, does anybody want to be heard on Jelks Exhibit 5, make any further objections? All right. Jelks Exhibit 5 is rejected on two basic grounds, and the record will so reflect.